

## CHAPTER FOURTEEN

### COMPETITION-RELATED MATTERS

#### ARTICLE 14.1 : OBJECTIVES

Recognizing that the conduct subject to this Chapter has the potential to restrict bilateral trade and investment, the Parties believe that proscribing such conduct, implementing policies that promote economic efficiency and consumer welfare, and cooperating on matters covered by this Chapter will help secure the benefits of this Agreement.

#### ARTICLE 14.2 : COMPETITION LAW AND ANTICOMPETITIVE BUSINESS CONDUCT

1. Each Party shall maintain or adopt measures to proscribe anticompetitive business conduct and take appropriate action with respect thereto, recognizing that such measures will help realise the objectives of this Agreement. To this end, the Parties shall consult from time to time about the effectiveness of measures that a Party has undertaken. Each Party shall ensure that a person subject to the imposition of a sanction or remedy for violation of such measures is provided with the opportunity to be heard and to present evidence, and to seek review of such sanction or remedy in a court or independent tribunal of that Party.

2. Each Party shall maintain an authority or authorities responsible for the enforcement of its national competition laws. The enforcement policy of each Party's central government authorities responsible for the enforcement of such laws includes treating non-nationals no less favourably than nationals in like circumstances, and each Party's authorities intend to maintain this policy, in that regard.

3. The Parties recognize the importance of cooperation and coordination between their respective authorities to further effective competition law enforcement in the free trade area. The Parties shall cooperate in relation to the enforcement of competition laws and policy, including through mutual assistance, notification, consultation, and exchange of information.

- (a) The Parties recognize their existing mechanisms for cooperation in relation to competition law enforcement, specifically:
  - (i) *The Agreement between the Government of Australia and the Government of the United States of America relating to Cooperation on Antitrust Matters of 1982; and*
  - (ii) *The Agreement between the Government of Australia and the Government of the United States of America on Mutual Antitrust Enforcement Assistance of 1999.*
- (b) The Parties shall work to further strengthen their cooperation in these areas. Such cooperation shall include consideration by a Party's central government authorities responsible for the enforcement of its

competition laws, where feasible and appropriate, of a request by the other Party's central government authorities responsible for the enforcement of its competition laws to initiate or expand enforcement activities.

4. To further advance their cooperation, the Parties shall examine the scope for strengthening support for, and minimizing legal impediments to, the effective enforcement of each other's competition laws and policies. The Parties shall establish a joint working group with the goal of seeking to reach a common view, by the first meeting of the Joint Committee established pursuant to Chapter 21 (Institutional Arrangements and Dispute Settlement), of appropriate steps to enhance their respective legal and regulatory regimes in that regard.

#### ARTICLE 14.3 : DESIGNATED MONOPOLIES

1. Recognizing that designated monopolies should not operate in a manner that creates obstacles to trade and investment, each Party shall ensure that any privately-owned monopoly that it designates after the date of entry into force of this Agreement and any government monopoly that it designates or has designated:

- (a) acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such a monopoly exercises any regulatory, administrative, or other governmental authority that the Party has delegated to it in connection with the monopoly good or service, such as the power to grant import or export licenses, approve commercial transactions, or impose quotas, fees, or other charges;
- (b) acts solely in accordance with commercial considerations in its purchase or sale of the monopoly good or service in the relevant market, including with regard to price, quality, availability, marketability, transportation, and other terms and conditions of purchase or sale, except to comply with any terms of its designation that are not inconsistent with subparagraph (c) or (d);
- (c) provides non-discriminatory treatment to covered investments, to goods of the other Party, and to service suppliers of the other Party in its purchase or sale of the monopoly good or service in the relevant market; and
- (d) does not use its monopoly position to engage, either directly or indirectly, including through its dealings with its parent, subsidiaries, or other enterprises with common ownership, in anticompetitive practices in a non-monopolized market in its territory, where such practices adversely affect covered investments.

2. Nothing in this Chapter shall be construed as preventing a Party from designating a monopoly.

3. This Article does not apply to government procurement.

#### ARTICLE 14.4 : STATE ENTERPRISES AND RELATED MATTERS

1. The Parties recognize that state enterprises should not operate in a manner that creates obstacles to trade and investment. In that light, each Party shall ensure that any state enterprise that it establishes or maintains:
  - (a) acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such enterprise exercises any regulatory, administrative, or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges; and
  - (b) accords non-discriminatory treatment in the sale of its goods or services.
2. The United States shall ensure that anticompetitive activities by sub-federal state enterprises are not excluded from the reach of its national antitrust laws solely by reason of their status as sub-federal state enterprises, to the extent that their activities are not protected by the State Action Doctrine.
3. Australia shall take reasonable measures, including through its policy of competitive neutrality, to ensure that its governments at all levels do not provide any competitive advantage to any government businesses simply because they are government-owned. This paragraph applies to the business activities of government businesses and not to their non-business, non-commercial activities. Australia shall ensure that its competitive neutrality complaints offices treat complaints lodged by the United States, or persons of the United States, no less favourably than complaints lodged by persons or government bodies of Australia.

#### ARTICLE 14.5 : DIFFERENCES IN PRICING

Articles 14.3 and 14.4 shall not be construed as preventing a monopoly or state enterprise from charging different prices in different markets, or within the same market, where such differences are based on normal commercial considerations, such as taking account of supply and demand conditions.

#### ARTICLE 14.6 : CROSS BORDER CONSUMER PROTECTION

1. The Parties recognize the importance of cooperation and coordination on matters related to their consumer protection laws in order to enhance consumer welfare in the free trade area. Accordingly, the Parties shall cooperate in the enforcement of their consumer protection laws.
2. The Parties recognize the existing mechanisms for cooperation in relation to consumer protection, including:
  - (a) *the Agreement between the Federal Trade Commission of the United States of America and the Australian Competition and Consumer Commission on the*

*Mutual Enforcement Assistance in Consumer Protection Matters of 2000;*

- (b) *the OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders of 2003;* and
- (c) the International Consumer Protection and Enforcement Network (ICPEN).

3. The Parties shall further strengthen cooperation and coordination among their respective agencies, including the U.S. Federal Trade Commission (FTC) and the Australian Competition and Consumer Commission (ACCC) in areas of mutual concern, in particular fraudulent and deceptive commercial practices against consumers:

- (a) in the development of appropriate procedures for
  - (i) cooperating in the prompt detection of consumer protection law violations affecting consumers or markets in both Parties' territories,
  - (ii) notifying each other of significant investigations and proceedings involving consumer protection law violations occurring or originating in the territory of the other Party or significantly affecting consumers or markets in the territory of the other Party,
  - (iii) exchanging information related to the administration of their consumer protection laws,
  - (iv) providing enforcement and investigative assistance to each other to the extent compatible with each Party's laws, in appropriate consumer protection law cases, and
  - (v) consulting and coordinating on enforcement actions against consumer protection law violations that have a significant cross-border dimension;
- (b) in the development of coordinated strategies to combat fraudulent and deceptive commercial practices against consumers, both bilaterally and multilaterally; and
- (c) through joint study of additional measures to enhance the scope and effectiveness of information sharing, investigative assistance, and cooperation and coordination in the enforcement of the Parties' respective consumer protection laws, including the use of investigative powers and participation in appropriate court proceedings.

4. Nothing in this Article shall limit the discretion of the FTC or ACCC to decide whether to take action on particular requests by the other agency, or shall preclude either agency from taking action with respect to particular cases.

5. In addition, the Parties shall identify, in areas of mutual concern and consistent with their important interests, obstacles to effective cross-border cooperation in the enforcement of consumer protection laws, and shall consider changing their domestic frameworks to overcome

such obstacles and enhance the ability of the Parties to cooperate, share information, and assist in the enforcement of each other's consumer protection laws, including, if appropriate, adopting or amending national legislation to overcome such obstacles.

#### ARTICLE 14.7 : RECOGNITION AND ENFORCEMENT OF MONETARY JUDGMENTS

1. The Parties recognize the importance of civil proceedings by the FTC, U.S. Securities and Exchange Commission, U.S. Commodity Futures Trading Commission, Australian Securities and Investments Commission, and the ACCC to provide monetary restitution to consumers, investors, or customers who have suffered economic harm as a result of being deceived, defrauded, or misled. The Parties further recognize the importance of facilitating cross-border recognition and enforcement of monetary judgments obtained for such purposes.
2. When an agency listed in paragraph 1 obtains a civil monetary judgment from a judicial authority of a Party for the purpose of providing monetary restitution to consumers, investors, or customers who have suffered economic harm as a result of being deceived, defrauded, or misled, a judicial authority of the other Party generally should not disqualify such a monetary judgment from recognition or enforcement on the ground that it is penal or revenue in nature or based on other foreign public law, including where such judgment contains provisions for recovery of monies or other disposition in the event that restitution is impractical or for payment of expenses related to the collection or distribution of such a monetary judgment.
3. The judicial authorities of a Party should consider the recognition or enforcement of provisions for monetary judgments described in paragraph 2 separately from other provisions of the judgment, to the extent such other provisions are deemed to be penal or revenue in nature or based on other foreign public law for the purposes of recognition or enforcement.
4. Nothing in this Article is intended to affect whether any other category of law or judgment is appropriately viewed as penal or revenue in nature or based on other foreign public law for the purposes of the recognition or enforcement of foreign judgments.
5. Each Party's agencies listed in paragraph 1 should cooperate with the relevant agencies of the other Party, where feasible and appropriate, in facilitating the identification of consumers, investors, and customers described in paragraph 2 and on other matters relating to payment of monetary judgments.
6. The Parties shall work together to examine the scope for establishing greater bilateral recognition of foreign judgments of their respective judicial authorities obtained for the benefit of consumers, investors, or customers who have suffered economic harm as a result of being deceived, defrauded, or misled; and shall report on the feasibility and appropriateness of, and progress toward, greater recognition of such foreign judgments at the first meeting of the Joint Committee.

#### ARTICLE 14.8 : TRANSPARENCY

1. The Parties recognize the value of transparency in their competition policies.

2. On request of a Party, each Party shall make available to the other Party public information concerning:
  - (a) the enforcement of its measures proscribing anticompetitive business conduct;
  - (b) its state enterprises, government businesses, and public or private designated monopolies, provided that requests for such information shall indicate the entities involved, specify the particular products and markets concerned, and include indicia that these entities may be engaging in practices that may hinder trade or investment between the Parties; and
  - (c) exemptions and immunities to its measures proscribing anticompetitive business conduct, provided that requests shall specify the particular goods and markets of concern and include indicia that the exemptions and immunities may hinder trade or investment between the Parties.

#### ARTICLE 14.9 : COOPERATION

The Parties recognize that policies related to matters covered by this Chapter can be a force for open and competitive markets domestically and internationally. They also recognize that such policies can have an effect on investment and on the extent to which enterprises of a Party can compete with, sell goods and services to, and purchase good and services from enterprises of the other Party. Accordingly, the Parties shall cooperate, including in the manner provided for in Articles 14.2.3 and 14.6, to promote policies related to matters covered by this Chapter that foster free trade and investment and competitive markets.

#### ARTICLE 14.10 : CONSULTATIONS

1. To foster understanding between the Parties, or to address specific matters that arise under this Chapter, each Party shall, on request of the other Party, enter into consultations regarding representations made by the other Party. In its request, the Party shall indicate, if relevant, how the matter affects trade or investment between the Parties.
2. The Party to which a request for consultations has been addressed shall accord full and sympathetic consideration to the concerns raised by the Party having made the request.

#### ARTICLE 14.11 : DISPUTE SETTLEMENT

Neither Party may have recourse to dispute settlement under this Agreement for any matter arising under Articles 14.2, 14.4.2, 14.4.3, 14.6, 14.7, 14.9, or 14.10.2.

#### ARTICLE 14.12 : DEFINITIONS

For the purposes of this Chapter:

1. **consumer protection laws** means:

- (a) in the case of the United States, laws and regulations prohibiting “unfair or deceptive acts or practices” within the meaning of Section 5 of the *Federal Trade Commission Act*; and
  - (b) in the case of Australia, Parts IVA, V, and VC of the *Trade Practices Act 1974*;  
as well as any amendments thereto, and such other laws or regulations as the Parties may agree in writing;
2. **designate** means, whether formally or in effect, to establish, designate, or authorize a monopoly or to expand the scope of a monopoly to cover an additional good or service;
  3. **government businesses** means Australian government businesses within the meaning of Australia’s Competition Principles Agreement of 1995;
  4. **government monopoly** means a monopoly that is owned, or controlled through ownership interests, by the central government of a Party or by another such monopoly;
  5. **in accordance with commercial considerations** means consistent with normal business practices of privately-held enterprises in the relevant business or industry;
  6. **market** means the geographical and commercial market for a good or service;
  7. **monopoly** means an entity, including a consortium or government agency, that in any relevant market in the territory of a Party is designated as the sole provider or purchaser of a good or service, but does not include an entity that has been granted an exclusive intellectual property right solely by reason of such grant;
  8. **non-discriminatory treatment** means the better of national treatment and most-favoured-nation treatment, as set out in the relevant provisions of this Agreement, including the terms and conditions set out in the relevant Annexes thereto; and
  9. **state enterprise** means an enterprise owned, or controlled through ownership interests, by any level of government of a Party.