
The Parliament of the Commonwealth of Australia

REPORT 25

Eight Treaties Tabled on 11 August 1999

Joint Standing Committee on Treaties

September 1999

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ISBN



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Membership of the Committee

Chair The Hon Andrew Thomson MP

Deputy Chair Senator Barney Cooney

| | | |
|----------------|--------------------------|-------------------------------|
| Members | The Hon Dick Adams MP | Senator Vicki Bourne |
| | The Hon Bruce Baird MP | Senator Helen Coonan |
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Recommendations

Scientific and Technical Cooperation Agreement with the European Community

The Committee supports the proposed amendment to the *Agreement Relating to Scientific and Technical Cooperation between Australia and the European Community*, and recommends that binding treaty action be taken (paragraph 2.18).

Fourth Amendment of the Articles of Agreement of the International Monetary Fund

The Committee recommends that the Australian Government, at meetings of the governing bodies of the World Bank and the International Monetary Fund, actively support reform of these institutions, with a view to reducing duplication and waste in their operations and, as a longer term goal, their amalgamation (paragraph 3.66).

The Committee supports the proposed *Fourth Amendment of the Articles of Agreement of the International Monetary Fund*, and recommends that binding treaty action be taken (paragraph 3.68).

Mutual Antitrust Enforcement Assistance Agreement with the United States

The Committee supports the proposed *Agreement between the Government of Australia and the Government of the United States of America on Mutual Antitrust Enforcement Assistance*, and recommends that binding treaty action be taken (paragraph 4.25).

Food Aid Convention

The Committee supports the proposed *Food Aid Convention*, and recommends that binding treaty action be taken (paragraph 5.27).

Double Taxation Agreement with South Africa

The Committee supports the proposed *Agreement with South Africa for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income*, and recommends that binding treaty action be taken (paragraph 6.46).

Protocol to amend the Double Taxation Agreement with Malaysia

The Committee supports the proposed *Protocol to amend the Agreement with Malaysia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income*, and recommends that binding treaty action be taken (paragraph 6.47).

Exchange of Letters constituting an Agreement to extend the Application of Certain Provisions of the Double Taxation Agreement with Malaysia

The Committee supports the proposed *Exchange of Letters constituting an Agreement to extend the Application of Certain Provisions of Article 23 of the Agreement with Malaysia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income*, and recommends that binding treaty action be taken (paragraph 6.48).

The Committee recommends that the Australian Taxation Office extend its community and industry consultation program by inviting representatives of country-specific business organisations to participate in meetings of the Treaties Advisory Panel when treaty proposals relating to those countries are being considered (paragraph 6.51).

Agreement concerning the Adoption of Uniform Technical Prescriptions for Wheeled Vehicles

The Committee supports the proposed *Agreement concerning the Adoption of Uniform Technical Prescriptions for Wheeled Vehicles, Equipment and Parts and the Conditions for Reciprocal Recognition of Approvals Granted on the Basis of these Prescriptions*, and recommends:

- that binding treaty action be taken; and at the same time,
- that a declaration be issued advising that the Australian Government will not be bound by any of the Regulations annexed to the Agreement until further notification is given (paragraph 7.26).

Introduction

Purpose of the Report

- 1.1 This Report contains advice to the Parliament on the review by the Joint Standing Committee on Treaties (the Committee) of the following, proposed treaty actions, tabled in both Houses of the Parliament on 11 August 1999:
- proposed *Agreement to amend the Scientific and Technical Cooperation Agreement with the European Community*, in Chapter 2;
 - proposed *Fourth Amendment of the Articles of Agreement of the International Monetary Fund*, in Chapter 3;
 - proposed *Agreement with the USA on Mutual Antitrust Enforcement Assistance*, in Chapter 4;
 - proposed *Food Aid Convention, 1999*, in Chapter 5;
 - proposed *Agreement with the Government of South Africa for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Protocol*, in Chapter 6;
 - proposed *Protocol to amend the Agreement with the Government of Malaysia for the Avoidance of Double taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income*, and proposed *Exchange of Letters Constituting an Agreement to extend the Application of Certain provisions of Article 23 of the Agreement with the Government of Malaysia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income*, also in Chapter 6;¹ and

¹ The proposed *Exchange of Letters Constituting an Agreement to extend the Application of Certain provisions of Article 23 of the Agreement with the Government of Malaysia for the Avoidance of Double*

- proposed *Agreement concerning the Adoption of Uniform Technical Prescriptions for Wheeled Vehicles, Equipment and parts which can be fitted and/or be used on Wheeled Vehicles and the Conditions for Reciprocal Recognition of Approvals Granted on the Basis of these Prescriptions, as amended*, in Chapter 7.
- 1.2 There were two other treaties tabled in Parliament on 11 August 1999:
- a proposal to terminate the Social Security Agreement with the United Kingdom; and
 - the new [second] revised text of the International Plant Protection Convention.
- 1.3 We have commenced, but not yet completed, our review of these two treaty actions. We have written to the Minister for Foreign Affairs advising him of the reasons why it has not yet been possible to complete these reviews. We expect that they will be completed shortly, and that we will present a report to Parliament before the end of the Spring sittings.

Availability of documents

- 1.4 The advice in this Report refers to, and should be read in conjunction with, the National Interest Analyses (NIAs) prepared for these proposed treaty actions. These analyses were prepared by for each proposed treaty action by the Government agency responsible for the administration of Australia's responsibilities under each treaty. The NIAs were tabled in Parliament as aids to Parliamentarians when considering these proposed treaty actions.
- 1.5 Copies of each of the treaties, and the NIA prepared for each proposed treaty action, can be obtained from the Treaties Library maintained on the Internet by the Department of Foreign Affairs and Trade (DFAT) (www.austlii.edu.au/au/other/dfat/), or from the Committee Secretariat.

Conduct of the Committee's review

- 1.6 Our review of each of the proposed treaty actions considered in this Report was advertised in the national press, and on our web site at: www.aph.gov.au/house/committee/jsct/. A number of submissions

Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income was tabled in the Parliament on 25 August 1999.

were received in response to the invitation to comment in the advertisement. A list of those submissions is at Appendix B.²

- 1.7 For these proposed treaty actions, we gathered evidence at a public hearings on 23 and 30 August 1999. Appendix C lists the witnesses who gave evidence at those hearings.
- 1.8 A transcript of the evidence taken at the hearings can be obtained from the database maintained on the Internet by the Department of the Parliamentary Reporting Staff at: www.aph.gov.au/hansard/joint/committee/comjoint.htm, or from the Committee Secretariat.
- 1.9 We always seek to consider and report on each proposed treaty action within 15 sitting days of it being tabled in Parliament. In the case of these proposed treaty actions tabled on 11 August 1999, the 15 sitting day period expires on 27 September 1999.

² This review of these proposed treaty actions was advertised in *The Weekend Australian* on 14/15 August 1999, p. 17.

Scientific and Technical Cooperation Agreement with the European Community

The Head Agreement

- 2.1 The *Agreement Relating to Scientific and Technical Cooperation between Australia and the European Community* (hereafter 'the Head Agreement'), done at Canberra on 23 February 1994, established 'formal arrangements to encourage and facilitate science and technology cooperation between Australia and the European Community'.¹
- 2.2 The Head Agreement has allowed Australians to participate in cooperative research and development projects with the European Community (EC) under its Fourth Framework Programme for research and development (1994-98).²
- 2.3 The Framework Programme is a collaborative research and development program to which all the members of the European Union subscribe. It is separate from the research and development activities of the individual countries that make up the Union. These Programmes manage research and development activities across Europe – funding and coordinating selected projects.³

1 Unless otherwise specified, material in this section was drawn from the National Interest Analysis (NIA) for the proposed *Agreement Amending the Agreement Relating to Scientific and Technical Cooperation between Australia and the European Community* (hereafter 'NIA for the 1999 Amendment'), p. 1

2 NIA for the 1999 Amendment, p. 2

3 Eric James (Department of Industry, Science and Resources, hereafter 'DISR'), *Transcript of Evidence*, 23 August 1999, p. TR20, NIA for the 1999 Amendment, p. 1

- 2.4 The Head Agreement has also allowed members of the EC to participate in research and development projects conducted by Australia.

Proposed treaty action

- 2.5 Cooperative research and development under the Head Agreement, however, is restricted by Article 4(2) to six sectors:
- biotechnology;
 - medical and health research;
 - marine science and technology
 - environment
 - information technologies; and
 - communication technologies.⁴
- 2.6 The proposed *Agreement Amending the Agreement Relating to Scientific and Technical Cooperation Between the European Community and Australia* (hereafter ‘the 1999 Amendment’) will replace the text of Article 4(2) of the Head Agreement with a new text which removes any restriction on the areas in which cooperative research and development can be conducted.
- 2.7 Thus, Australia will be able to participate in cooperative projects in all fields of research and development of the fifth (1999-2002) and all subsequent EC Framework Programmes.⁵
- 2.8 The EC will also be able to participate in any Australian research or development projects conducted by the Commonwealth, States, and Territories, or by non-government authorities and private sector research entities.⁶

Obligations imposed by the proposed treaty action

- 2.9 The proposed 1999 Amendment to Article 4(2) of the Head Agreement imposes no new obligations on Australia. If adopted, it will have the effect of extending the operation of the Head Agreement’s current obligations to
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4 NIA for the 1999 Amendment, p. 1

5 NIA for the 1999 Amendment, p. 1

6 Third paragraph of Article 1 of the 1999 Amendment

cover any supplementary fields of cooperative research and development activity.⁷

- 2.10 The National Interest Analysis (NIA) stated that the 1999 Amendment would not create any additional costs to those already possible under the Head Agreement.⁸

Date of binding treaty action

- 2.11 The proposed Agreement will come into force on the date on which the two parties have notified each other in writing that their legal requirements for its entry into force have been fulfilled. This is intended to take place as soon as practicable after 27 September 1999.⁹

Benefits to Australia

- 2.12 Under the Head Agreement, Australia currently participates in 37 Fourth Framework Programme projects. The benefits from this participation include:
- progress towards solving significant problems by pooling resources;
 - access to European knowledge and technology;
 - a share in the intellectual property produced by projects; and
 - access to European markets for new technologies.¹⁰

Consultation

- 2.13 The States and Territories were advised of the proposed 1999 Amendment and all State Premiers and Territory Chief Ministers supported it. In evidence at our hearing officials from the Department of Industry, Science and Resources (DISR) stated that the proposed 1999 Amendment was

7 NIA for the 1999 Amendment, pp. 2-3

8 NIA for the 1999 Amendment, p. 3

9 Article 2 of the 1999 Amendment, NIA for the 1999 Amendment, p. 1

10 NIA for the 1999 Amendment, p. 2

important to the States and Territories because a number of them fund research and development activities that might well be affected.¹¹

- 2.14 Referring to consultation about the proposed 1999 Amendment, we were advised that DISR:

maintains continuing contact with scientific organisations and researchers with the academies of science, the major public sector research organisations, the universities and researchers in private industry.¹²

- 2.15 DISR has been working with EU representatives in Australia to increase knowledge and awareness of the opportunities that are shortly to become available. The Department also plans to disseminate information to the scientific community in Australia about the change. Because of the substantial size and segregation of this community, this will be done through the umbrella organisations to which Australian scientific bodies are connected.¹³

Conclusion and recommendation

- 2.16 The Head Agreement seems to be operating effectively and providing a useful mechanism for encouraging scientific and technical cooperation between Australian and European scientists. There is some evidence that projects being conducted under the auspices of the Agreement may lead to new scientific insights, new technologies and tangible economic benefits to both parties.
- 2.17 Seeking to expand the opportunities for such cooperation is a worthwhile objective. Accordingly, we support the proposed amendment.

Recommendation 1

- 2.18 **The Committee supports the proposed amendment to the *Agreement Relating to Scientific and Technical Cooperation between Australia and the European Community*, and recommends that binding treaty action be taken.**

11 NIA for the 1999 Amendment, p. 4, Eric James (DISR), *Transcript of Evidence*, 23 August 1999, p. TR21

12 Eric James (DISR), *Transcript of Evidence*, 23 August 1999, p. TR21

13 Eric James (DISR), *Transcript of Evidence*, 23 August 1999, pp. TR21, 23

- 2.19 While we support the proposed treaty action, we are concerned that there seems to have been little community consultation undertaken during the development of this proposal. The section on consultation in the NIA concentrated on dealings with the States/Territories, stating that DISR would continue to consult 'other interested parties on the implementation of the 1999 Amendment, as appropriate.' At the public hearing on this matter, we were told of DISR's continuing contact with a range of scientific organisations.
- 2.20 While this is worthwhile and necessary general activity in the field, no evidence was presented that there had been consultations **specifically** on the 1999 Amendment directly with any relevant bodies. This is contrary to our understanding of the central role consultation should play in the reformed treaty-making process introduced in 1996.
- 2.21 Wide and effective public consultation is a critical and non-negotiable part the reformed treaty making process. Not only does effective consultation allow interested parties to contribute their expertise to the development of proposed treaties and help build community confidence in treaty making, but it helps generate support for particular treaty actions. Government agencies have a strong interest in demonstrating that a proposed treaty action has strong support within relevant industry, professional and community organisations.
- 2.22 Many of our previous reports have commented on this issue, and it is surprising that some agencies still do not seem to grasp this point.

Fourth Amendment to the IMF's Articles of Agreement

Background

The IMF

- 3.1 The International Monetary Fund (IMF) is a cooperative inter governmental monetary and financial institution with near universal international membership. Its creation was one of the results of the United Nations' Monetary and Financial Conference at Bretton Woods, New Hampshire, USA, in July 1944. It was founded in 1945 against the background of the depression of the 1930s, the widespread destruction and misery of the Second World War and the establishment of the United Nations.¹
- 3.2 As set out in its Articles of Agreement, the IMF's purposes are²:
- to promote international monetary cooperation through a permanent institution which provides the machinery for consultation and collaboration on international monetary problems;
 - to facilitate the expansion and balanced growth of international trade, and to contribute thereby to the promotion of high levels of employment and real income;

1 Karen Spindler (Treasury), *Transcript of Evidence*, 23 August 1999, p. TR24

2 See *Australian Treaty List, Multilateral* (as at 31 December 1998), Department of Foreign Affairs and Trade p. 369

- to promote exchange stability, to maintain orderly exchange arrangements among members, and to avoid competitive exchange depreciation;
- to assist in the establishment of a multilateral system of payments in respect of current transactions between members and in the elimination of foreign exchange restrictions which hamper the growth of world trade;
- to give confidence to members by making the Fund's resources available to them under adequate safeguards; and
- in accordance with the above, to shorten the duration and lessen the degree of disequilibrium in the international balances of payments of members.³

3.3 The *Articles of Agreement of the International Monetary Fund* entered into force generally on 27 December 1945, and for Australia on 5 August 1947. They have been previously amended in 1968, 1976 and 1990.⁴

Special Drawing Rights

3.4 The IMF is a quota-based institution, and each member is assigned a quota equal to its subscription of capital, related to its size and economic prosperity. Its Special Drawing Rights (SDR) Department records all transactions and operations involving SDRs. Participation in this Department is voluntary for IMF members but, at present, all members are participants.⁵

3.5 SDRs are interest-bearing international reserve assets. They were first created by the IMF in 1969 to supplement members' existing reserve assets: official holdings of gold, foreign exchange and reserve positions in the IMF.

3.6 They serve as the IMF's unit of account, and are used for its transactions and operations. Their value is calculated daily in terms of a basket of currencies of the five member countries of the IMF with the largest exports of goods and services. Currently, the US dollar, Japanese yen, Euro

3 Australian Treaty Series, 1947, No 11, *Articles of Agreement of the International Monetary Fund*, Department of Foreign Affairs and Trade, Article 1

4 *Australian Treaty List, Multilateral* (as at 31 December 1998), Department of Foreign Affairs and Trade, p. 369

5 Quotas are reviewed each five years in line with a country's position in the world economy: Karen Spindler (Treasury), *Transcript of Evidence*, 23 August 1999, p. TR 25. Unless specified otherwise, material in this section was drawn from the National Interest Analysis (NIA) for the *Fourth Amendment Proposed to the IMF's Articles of Agreement* (hereafter 'NIA for the IMF'), p. 2

(Germany and France) and the British pound are included in the SDR basket. The composition and weights of this basket is revised every five years. One SDR is currently worth just over \$A2.⁶

- 3.7 The IMF has the authority, under Article XV, Section 1, and Article XVIII of its Articles of Association to create unconditional liquidity through general allocations of SDRs to members in proportion to their quotas. In its decisions on general allocations of SDRs, the IMF has sought to meet the long-term, global need to supplement existing reserve assets in a way that will promote the attainment of its purposes, avoid economic stagflation and deflation as well as excess demand and inflation.
- 3.8 There were general allocations of SDRs in 1972 and 1981.

Proposed Amendment

- 3.9 If accepted, the proposed *Fourth Amendment of the Articles of Agreement of the International Monetary Fund* would amend the text of Article XV, Section 1, and add Schedule M to those Articles of Agreement. The latter sets out the method of dispersing this proposed special allocation of SDRs.⁷
- 3.10 Should it enter into force, the proposed Fourth Amendment would provide the authority under Article XV for a special, once-only allocation of SDR21.43 billion. Each participant would only receive one allocation.⁸
- 3.11 The purpose of the proposed amendment is to equalise all members' ratios of cumulative SDR allocations relative to their quotas in the IMF, at a common benchmark level of approximately 29.32 per cent. It would also double the cumulative SDR allocations to members to SDR42.87 billion.⁹
- 3.12 The proposed amendment also provides for each future participant to receive a special allocation, unless the IMF is notified it is not to be received. It would not effect the IMF's existing power to make general allocations of SDRs, based on a finding of a long term global need to supplement reserves as and when such a need might arise.¹⁰

6 Karen Spindler (Treasury), *Transcript of Evidence*, 23 August 1999, p. TR24

7 NIA for the IMF, pp. 3-4

8 NIA for the IMF, p. 3

9 NIA for the IMF, p. 3

10 NIA for the IMF, p. 3

- 3.13 If the proposed amendment is accepted and enters into force, IMF members have the option not to take up this special allocation by notifying that intention in writing. The allocation will not be distributed to members who have already given notice of their intention not to receive it.¹¹
- 3.14 For those members with an overdue obligation to the IMF, their SDRs will be deposited in a special or escrow account until those obligations have been discharged.¹²

Reasons for proposed Amendment

- 3.15 Since 1993, the Executive Board of the IMF has had concerns that there was not an equitable share of cumulative SDRs between members relative to their quotas. This was because:
- some members, in particular those whose economies are in transition, had joined the IMF since the last general allocation of SDRs in 1981, and have not received an allocation. In particular, some East European nations have no SDRs because there has not been an allocation since they became members,¹³ and
 - some members that participated in previous general allocations have very low ratios of cumulative allocations to quotas because of past increases in their share in total quotas.¹⁴
- 3.16 According to the National Interest Analysis (NIA) for the proposal, 'quite a few' less developed nations have a zero allocation of SDRs and, if the proposed amendment is accepted, will receive many more of them in proportion to their quota than Australia or other industrialised nations.¹⁵
- 3.17 A general allocation of SDRs can only be made when there is consensus among IMF members that there is a need for such an allocation. In mid-1996, the Managing Director of the IMF concluded that there was no such consensus.¹⁶

11 NIA for the IMF, p. 4. Treasury reported that the IMF had advised that the People's Republic of China is the only nation not to have taken up its allocations of SDRs. No reason was given by the IMF. See *Submission No 1*, p. 1

12 NIA for the IMF, p. 4

13 Karen Spindler (Treasury), *Transcript of Evidence*, 23 August 1999, p. TR26

14 NIA for the IMF, p. 2. It stated that 39 members had joined the IMF since 1981.

15 Karen Spindler (Treasury), *Transcript of Evidence*, 23 August 1999, p. TR26

16 Karen Spindler (Treasury), *Transcript of Evidence*, 23 August 1999, p. TR24

Date of effect of proposed Amendment

- 3.18 In the absence of consensus, Article XXVIII sets out a two-stage procedure for the adoption of amendments to the Articles of Agreement. The first stage was completed in September 1997, when the Board of Governors approved the proposed Fourth Amendment.
- 3.19 The second stage was initiated in October 1997, when members were asked whether they would accept the proposed Fourth Amendment. In accordance with Article XXVIII, and the September 1997 decision of the Board of Governors, the proposed amendment will enter into force when three-fifths (109 members) of the IMF, having 85 per cent of the total voting power, have accepted it. If it enters into force, the amendment would be binding on all members, including those who have not advised their view on the proposal.
- 3.20 Acceptance of the proposed amendment will be possible until the required threshold of countries and voting power is reached, or until the IMF Board decides to close off the possibility for change. In August 1999, 68 members or about 45 per cent of the total membership of the IMF, had notified acceptance of the proposed amendment.¹⁷
- 3.21 Subject to our consideration, Australia proposes to lodge an instrument of acceptance for the proposed amendment as soon as practicable after the expiration of the '15 sitting day' period on 27 September 1999.¹⁸

Benefits of proposed Amendment

- 3.22 The NIA noted that promoting greater equity in the operation of international financial institutions, such as the World Bank, the Asian Development Bank and the IMF itself, was consistent with Australian Government policy. Evidence was received that this allocation would 'perhaps not directly' further the aims of the IMF. The NIA also stated however that, if the proposed amendment did not enter into force, the IMF and, indirectly, Australia could be disadvantaged, as members might become less committed to its objectives and functions.¹⁹
- 3.23 Australia would benefit directly from the proposed amendment, as it would receive SDR213.5 million, or about \$A450 million, on the 30th day after it entered into force.

17 Karen Spindler (Treasury), *Transcript of Evidence*, 23 August 1999, pp. TR29, TR25

18 Unless specified otherwise, material in this section was drawn from the NIA for the IMF, p. 1

19 Material in this section was drawn from the NIA for the IMF, p. 3; Karen Spindler (Treasury), *Transcript of Evidence*, 23 August 1999, p. TR27

- 3.24 There would be an additional, indirect benefit to Australia from acceptance of the proposed amendment. Unless they elect not to take it up, the foreign reserves of all IMF members would be augmented as a result of this special allocation of SDRs. This would allow less wealthy countries to meet part of their reserve needs at a lower cost than otherwise. In turn, this should also lead to some easing of the demand on international financial institutions, and industrialised countries, to assist less wealthy and less developed nations.
- 3.25 The NIA observed that, in global terms, this special allocation would only add a small amount of reserves to international liquidity, and did not pose any risk of inflationary impact.'
- 3.26 Australia is the 15th largest member of the IMF. The NIA stated that its acceptance of the proposed amendment would send a positive signal to other members and help to build momentum towards meeting the conditions for its acceptance.

Costs

- 3.27 The NIA stated that this proposed treaty action was not expected to impose any foreseeable costs on Australia, or require any new domestic or management arrangements to be put in place.²⁰
- 3.28 If the proposed amendment is accepted, under Section 5A of the *International Monetary Agreements Act 1947*, the Reserve Bank of Australia (RBA) would be requested to buy Australia's allocation of SDR213.5 million from the Commonwealth, in exchange for Australian dollars. The NIA stated that receipt of these dollars, estimated to be worth about \$450 million, would not impact on the Commonwealth's fiscal budget balance.
- 3.29 It also pointed out that acceptance of the proposed amendment would lead to an increase in Australia's liabilities to the IMF, if SDRs were cancelled in future, or Australia withdrew from the SDR Department, or that Department were to be liquidated.
- 3.30 The receipt of the proposed allocation would also increase charges paid to the IMF by Australia on its cumulative SDR holdings. As with the receipt of Australian dollars, charges on these SDR holdings were considered to be 'financing transactions' and would not have any impact on the fiscal budget balance.
- 3.31 The NIA also stated that, if it proceeded, this SDR allocation and the transaction with the RBA would result in 'a modest increase' to the RBA's

20 Karen Spindler (Treasury), *Transcript of Evidence*, 23 August 1999, p. TR25

foreign reserve position, and a corresponding decrease in its holdings of Australian dollars. It was not yet possible to determine whether this would result in a net cost or net gain to the RBA.²¹

Implementation

- 3.32 The NIA stated that existing Commonwealth legislation would support acceptance of the proposed allocation, but that 'minor amendments' would be needed to update the Schedule to the *International Monetary Agreements Act 1947*. This reproduced the IMF's Articles of Agreement.²²
- 3.33 When these amendments have been made to that Act, the Treasurer would be able to direct the RBA to buy Australia's allocation of SDRs in exchange for Australian dollars. The NIA stated that the necessary legislation was expected to be introduced in the Parliament's 1999 Spring Session. The resulting Act could not take effect until the IMF had certified that the required conditions for the adoption of the proposed amendment had been met.

Consultation

- 3.34 The States/Territories were informed of this proposed treaty action through the official level Standing Committee on Treaties. The NIA noted that no concerns or objections were received.²³

Future amendments to the IMF's Articles of Agreement

- 3.35 While the proposed Fourth Amendment did not provide for future amendments, Article XXVIII allowed for amendments to the IMF's Articles of Agreement.²⁴

Withdrawal

- 3.36 Under Article XXVI, Section 1, of its Articles of Agreement, Australia may withdraw from the IMF at any time by giving notice in writing. Withdrawal would be effective on the date of receipt of that notice, and would result simultaneously in termination of participation in the SDR Department.

21 Unless specified otherwise, material in this section was drawn from the NIA for the IMF, pp. 4-5

22 Material in this section was drawn from the NIA for the IMF, p. 5

23 NIA for the IMF, p. 5

24 NIA for the IMF, p. 5

- 3.37 Under Article XXIV, Section 1, of the Articles of Agreement, Australia may terminate its participation in the SDR Department at any time by transmission of a notice in writing to the IMF. Termination would be effective on the date of receipt of that notice.
- 3.38 Its Articles of Agreement allow for the liquidation of the IMF, and also for the liquidation of the SDR Department.²⁵

Other evidence presented

- 3.39 Following our public hearing, Treasury provided information on changes to the composition of reserves by IMF members that participated in the general allocation of SDRs in 1981.²⁶
- 3.40 Treasury stated that there was evidence that industrial countries had high levels of SDRs as a proportion of their cumulative holdings. A large proportion of these countries had accumulated holdings in excess of 100 per cent of their cumulative allocations. Net debtor developing countries generally had low levels of SDRs as a proportion of cumulative allocations.
- 3.41 It was difficult to provide a general explanation for these observations because the possible reasons for holding or spending SDRs varied. These included:
- use of SDRs by net debtor nations to make interest payments on loans and service charges to the IMF;
 - purchases of SDRs by countries with strong balances of payments (BOPs) from other countries with BOP needs;
 - payments of SDRs to industrial countries reflecting remuneration payments and repayments of loans and interest payments from the IMF;
 - voluntary purchases of SDRs by industrial countries from developing countries for BOP requirements, and the needs of developing countries for reserves; and
 - changes to IMF policy in 1979 and 1981 concerning minimum requirements for holdings of SDRs by members.²⁷

25 Material in this section was drawn from the NIA for the IMF, pp. 5-6

26 See Karen Spindler (Treasury), *Transcript of Evidence*, 23 August 1999, p. TR28

27 Treasury, *Submission No 1*, pp. 1-2

The future of the IMF

- 3.42 With the IMF, another result of the United Nations' Monetary and Financial Conference at Bretton Woods in July 1944 was the Articles of Agreement for the International Bank for Reconstruction and Development, now known as the World Bank.²⁸
- 3.43 A recent article drew attention to the impact of the East Asian and Russian financial crises of recent years on what its author, Professor James Burnham, called 'the twin behemoths of government-sponsored international finance'.²⁹
- 3.44 When these bodies began operating, their roles were relatively easy to distinguish. The IMF's focus was on promoting 'international monetary cooperation', and it was consciously designed and operated in its early years as a central bank for members' own central banks. This role was expected to duplicate some of the functions of the Bank of International Settlements (BIS). At Bretton Woods, participants agreed that the BIS should be liquidated as soon as possible.³⁰
- 3.45 When it began operating, the World Bank confronted ample challenges in long-term development, at least as long as both industrial and developing countries imposed a myriad of controls on the flow of private international capital.³¹
- 3.46 In spite of their different focuses, the IMF and the World Bank quickly stumbled into overlapping purposes and the need for coordination. Based on their original purposes, the IMF has traditionally been seen as a short-term lender, providing liquidity for members with short-lived balance of payments problems. The Bank has been seen as the provider of longer-term finance. Given their operations today, the article asserted, both perceptions were 'badly misinformed'.³²
- 3.47 The Bretton Woods system of 'fixed but adjustable' exchange rates collapsed in the early 1970s, removing the IMF's chief preoccupation. At the same time, there was a growing belief that large-scale, officially

28 See *Australian Treaty List, Multilateral* (as at 31 December 1998), Department of Foreign Affairs and Trade, p. 370

29 Exhibit No 1

30 Exhibit No 1, p. 102. The BIS was set up under a multilateral agreement in 1930 and its immunities defined in a further agreement in 1936: see *Australian Treaty List, Multilateral* (as at 31 December 1998), Department of Foreign Affairs and Trade, pp. 346 and 358 respectively.

31 Exhibit No 1, p. 102. The article noted that the US Marshall Plan soon took over many of the 'reconstruction' functions included in the Bank's original title.

32 Exhibit No 1, pp. 102-103

managed transfers of investment capital to developing countries were the key to economic growth. These factors resulted in a drastically changed operating environment for both bodies.³³

- 3.48 As lending programs converged, confusion and duplications in lending operations and administrative structures became a serious problem, leading to significant financial and other costs. Based on their 1998 annual reports, the combined administrative budgets for the IMF and the World Bank totalled \$US1.7 billion. These charges are passed on to borrowers.³⁴
- 3.49 Former Secretary to the US Treasury, Mr George Shultz, was quoted in this article stating that the two bodies 'are becoming increasingly duplicative (*sic*), even though basically uncoordinated.' Professor Burnham argued for a merger, with a reduction of at least 25 per cent, or \$US425 million, in the administrative budget from 1998 levels, all of which could be reflected in lower charges or returned to shareholders.³⁵
- 3.50 While there was 'no serious effort at substantive reform' of either body in the past, there was now some interest in undertaking this work. This came at a time when there was renewed interest in an expanded role for the BIS, and in making the IMF into a fully-fledged 'lender of last resort'. This was a role in which the BIS acted in the 1980s, one in which Professor Burnham believed it was a far better judge of a country's economic and political prospects than the IMF.³⁶
- 3.51 Finally, Professor Burnham drew attention to the establishment by the US Congress of the International Financial Advisory Commission. Its charter is to examine the future role and responsibilities of the international financial institutions, including the regional development banks, the World Trade Organisation (WTO) and the BIS. Because of the inextricable links between international trade and capital movements, examination of both the BIS and the WTO held promise. Expanded trade, he argued, not taxpayers' dollars in the form of development assistance or subsidised loans, was the most desirable way to stimulate economic growth and financial stability in developing countries.³⁷
- 3.52 Professor Burnham believed that the Russian and East Asian financial crises exposed long simmering problems at the IMF and the World Bank. The US, he concluded, was the largest shareholder in both bodies and

33 Exhibit No 1, p. 103

34 Exhibit No 1, p. 104

35 Exhibit No 1, p. 107

36 Exhibit No 1, pp. 109, 108

37 Exhibit No 1, pp. 101, 110

should exercise its leadership with other concerned countries to replace the outdated international financial architecture of the 1950s with a body suited for the 21st Century. Merging the IMF and the World Bank 'can and should be an important part of any such reform.'³⁸

Committee views

National interest analyses

- 3.53 The purposes of NIAs were set out by the Minister for Foreign Affairs in a speech to the House of Representatives on 2 May 1996:
- to facilitate Parliamentary and community scrutiny of treaties;
 - to demonstrate the reasons for the Government's decision that Australia should enter into legally binding obligations under the particular treaty;
 - to meet the need identified by both the Senate Legal and Constitutional References Committee and the States/Territories in 1995, that no treaty should be ratified without an analysis of the impact a treaty would have on Australia; and
 - to achieve these aims, NIAs are to deal with the range of likely economic, social and cultural effects of a proposed treaty action, the obligations imposed, implementation, consultation and denunciation.³⁹
- 3.54 Papers tabled in, and produced by, the Parliament are read and used by a number of groups, ranging from specialists with depth and breadth of knowledge from long-term immersion in a subject, to the secondary or tertiary level student, to the more casual reader. The different needs of these groups should be taken into account, so that technical/professional jargon is, as far as possible, avoided. With this Committee in mind, the Department of Foreign Affairs and Trade advises Government agencies on the content and style of NIAs.⁴⁰

38 Exhibit No 1, pp. 110-111

39 House of Representatives, *Hansard*, 2 May 1996, pp. 233. The report of the Senate Legal and Constitutional References Committee was *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, November 1995.

40 See also this Committee's *Report 18: Multilateral Agreement on Investment: Final Report*, March 1999, p. 5

- 3.55 The NIA for the proposed Fourth Amendment to the IMF's Articles of Agreement included material under each of the required headings in some detail, but no concessions were made to anyone without technical knowledge of the subject. The purpose of the proposed amendment was included at the top of page 3, but no particular attention was given to it, nor was there any attempt to explain the detail of the proposed amendment for the benefit of the general reader.
- 3.56 It assists our consideration of more complex, technical matters if attempts are made to use simpler, less technical language in NIAs. Little if any attempt seems to have been made to put what could be complex issues to non-economists into more easily understood terms. The jargon in this NIA did not assist our understanding of the subject.
- 3.57 This proposed treaty action seeks to equalise SDR holdings of IMF members relative to their quotas. If it is not accepted, the NIA states that the IMF 'could possibly' be disadvantaged because members that did not receive an allocation might become less committed to its objectives and functions. Without being too harsh, these are not overwhelmingly convincing arguments for accepting the proposed amendment.
- 3.58 When dealing with the costs of the proposed treaty action, the NIA stated that, if it was accepted, it was not expected to impose 'any foreseeable costs' on Australia. It then pointed out:
- that it would lead to an increase in the Commonwealth's liabilities to the IMF;
 - that receipt of the allocation would increase SDR charges paid by Australia to the IMF;
 - that, while the allocation and the transaction between the Commonwealth and the RBA would result in 'a modest increase' to the foreign reserve position, there would also be a corresponding decrease in the RBA's holding of Australian dollars, but
 - that it was not possible to determine the final outcome of these transactions.
- 3.59 It is clear, therefore, that there may be a cost to Australia from accepting this amendment. If so, the first statement in the NIA about likely costs should have been omitted. Some more detailed attempt should then have been made to quantify the likely cost, according to at least one reasonable 'worst case' scenario.

Future of the IMF

3.60 Professor Burnham's article is not the only article, nor will it be the last word, on the future of the IMF. It was relevant to our consideration for its linkage of a possible revision of the roles of four important international bodies: the World Bank, WTO, the BIS and the IMF. The current duplications of functions are wasteful of scarce and valuable resources. The results of the US Congressional Advisory Commission's work may lead to recommendations for some restructuring, but bureaucratic opposition to implementing any changes may block any improvements.

Prime Minister's 1998 Task Force

3.61 Proposals to reform the structure and purposes of international financial institutions are easily dismissed as impractical and unlikely to achieve anything. Reform of what has been called the 'international financial architecture' was the subject of a Report by a Task Force, commissioned by the Australian Prime Minister in 1998 and headed by the Treasurer. It was set up to examine reform of international markets as result of the East Asian financial crisis which began in the middle of 1997.⁴¹

3.62 It reported in December 1998, noting that there had been criticism of the way international financial institutions had handled that crisis. It saw the IMF and multilateral development banks continuing to have legitimate roles and remaining integral players in crisis prevention and management. It recommended that the efforts by the World Bank and the IMF to achieve closer collaboration should be supported, especially as these related to reforming national financial systems.⁴²

3.63 It also recommended formation of a Financial Sector Policy Forum with wide representation, including the IMF, the World Bank and the BIS, to enhance international cooperation and provide a standing mechanism to respond to future international financial issues.⁴³

Conclusions and recommendations

3.64 Whether proposals to reform the IMF and the World Bank will amount to anything useful could be seen as irrelevant to the proposed Fourth

41 Exhibit No 2. There was some consideration of the Report of this Task Force in our *Report 18: Multilateral Agreement on Investment: Final Report*, March 1999, pp. 14-15.

42 Exhibit No 2, pp. 14-15

43 Exhibit No 2, p. 17

Amendment to the IMF's Articles of Agreement. Unless there are serious attempts to reform these bodies, however, the misuse of resources through overlap and duplication will continue. Professor Burnham's article and the Prime Minister's Task Force, in different ways, have both drawn attention to the problems and put forward some solutions. The pressure for reform, at both the international and national levels, must be sustained to have any hope of success.

- 3.65 With the backing of the Report of the Prime Minister's Task Force, and as a middle-ranking power actively involved in the operations of both the IMF and the World Bank, Australia seems to be in a good position to make a contribution to an agenda for reforming these bodies.

Recommendation 2

- 3.66 **The Committee recommends that the Australian Government, at meetings of the governing bodies of the World Bank and the International Monetary Fund, actively support reform of these institutions, with a view to reducing duplication and waste in their operations and, as a longer term goal, their amalgamation.**

- 3.67 Some aspects of the NIA and the submission provided for the proposed treaty action were unnecessarily complex and seemed to reflect an unwillingness to recast material in non-technical language. Nevertheless, we support the proposed treaty action.

Recommendation 3

- 3.68 **The Committee supports the proposed *Fourth Amendment of the Articles of Agreement of the International Monetary Fund*, and recommends that binding treaty action be taken.**

Mutual Antitrust Enforcement Assistance Agreement with the United States

Antitrust Laws

- 4.1 'Antitrust laws' is a term used to describe laws that, among other things, prohibit mergers and agreements that are likely to have the effect of substantially lessening competition in a domestic market.¹
- 4.2 Both the United States (US) and Australia have antitrust laws. In the US, the term is generally used to describe pro-competitive laws. The Australian version is the anti-competitive conduct laws contained in Part IV of the *Trade Practices Act 1974*. There are differences between these laws: in the US, both civil and criminal proceedings can be used against anti-competitive conduct. In Australia it would be a civil matter. The legislative aims are the same, however, and offences relating to cartels and mergers are the same in both jurisdictions.²
- 4.3 Both countries also have antitrust law enforcement bodies: in the US, the Department of Justice and the Federal Trade Commission. In Australia, the Australian Competition and Consumer Commission (ACCC) and the Attorney-General's Department (AGs) have this responsibility.³

1 Unless otherwise specified, material in this section was drawn from the National Interest Analysis (NIA) for the proposed *Agreement Between the Government of Australia and the Government of the United States of America on Mutual Antitrust Enforcement Assistance* (hereafter 'NIA for Antitrust Agreement'), p. 1

2 *Transcript of Evidence*, 23 August 1999: Hank Spier (ACCC), p. TR36, Annette Willing (AGs), p. TR33

3 NIA for Antitrust Agreement, p. 1

Proposed treaty action

- 4.4 Globalisation has led to changes in commercial and business structuring. This has meant that information, bodies and people that may be able to assist Australia in the investigation of possible contraventions of its competition laws are at times located outside its jurisdiction.⁴
- 4.5 The proposed *Agreement between the Government of Australia and the Government of the United States of America on Mutual Antitrust Enforcement Assistance* ('the Agreement'), will allow Australia to obtain information and evidence from the US that would be helpful in the enforcement of Australia's competition laws.
- 4.6 Without such an Agreement, the US *International Antitrust Enforcement Assistance Act 1994* prohibited US antitrust authorities from providing such assistance to another country's (ie. Australia's) antitrust enforcement bodies, unless the information being sought was already publicly available.⁵
- 4.7 By contrast, Australia can already supply such information to US antitrust authorities under the *Mutual Assistance in Criminal Matters Act 1987* and the *Mutual Assistance in Business Regulation Act 1992*.
- 4.8 The proposed Agreement would not extend the assistance that could be provided to the US from Australian antitrust authorities beyond that which can now be made available under these laws. Instead, it seeks reciprocity in the assistance given between the antitrust enforcement authorities of Australia and the US.⁶
- 4.9 The proposed Agreement would also ensure that information, evidence and witnesses that may be in the US could be made available to the ACCC for use in antitrust cases where there appears to be reduced competition in Australian markets.⁷
- 4.10 Finally, the proposed Agreement would set procedures in place that would fast-track processing and execution of requests for antitrust assistance.

4 NIA for Antitrust Agreement, p. 1

5 NIA for Antitrust Agreement, pp. 1-2

6 *Transcript of Evidence*, 23 August 1999: John Jepsen (Treasury), p. TR32; Annette Willing (AGs), p. TR34; Hank Spier (ACCC), p. TR38; Michael Manning (AGs), p. TR40; NIA for Antitrust Agreement, p. 2

7 NIA for Antitrust Agreement, p. 2

Obligations imposed by the proposed treaty action

- 4.11 In brief, under the proposed Agreement, the antitrust authorities of the US and Australia:
- may assist each other in obtaining information and evidence for use in antitrust matters, and may share information they have obtained in the course of their own investigations (Article II.A);
 - must, to the extent compatible with their laws, enforcement policies, and other important interests, inform each other:
 - (1) about activities that appear to be anti-competitive and that may be relevant to, or may warrant, enforcement activity by the other (Article II.B); and
 - (2) about investigative or enforcement activities taken pursuant to assistance provided under the proposed Agreement that may affect the important interests of the other Party (Article II.B); and
 - are required to inform each other of any significant changes in their countries antitrust or confidentiality laws (Article VIII).
- 4.12 It should also be noted that the proposed Agreement:
- does not require either Party or their respective antitrust authorities to take any action inconsistent with their respective mutual assistance legislation (Article II.D);⁸
 - makes clear that assistance may be provided whether or not the conduct underlying a request would constitute a violation of the antitrust laws of the Requested Party (Article II.F);
 - permits a Requested Party to deny assistance in whole or in part if it determines that, the request is not made in accordance with its provisions, or that execution of the request is not authorised by its law, is contrary to public interest, or is beyond the Executing Authorities reasonably available resources (Article IV.A);
 - sets out at some length procedures designed to prevent the unauthorised release of confidential information, and provides that each Party shall, to the fullest extent possible consistent with its laws, maintain the confidentiality of any request and of any information communicated to it in confidence by the other Party (Article VI.A);

8 A treaty on mutual assistance in criminal matters with the US was signed on 30 April 1997: Annette Willing (AGs), *Transcript of Evidence*, 23 August 1999, p. TR34. The previous Committee reported on this treaty in its *Tenth Report*, September 1997, tabled on 20 October 1997, at pp. 42-45.

- sets out the procedures by which requests for assistance are to be made and executed (Article III and V); and
 - provides, with one exception, that 'antitrust evidence obtained shall be used or disclosed solely for the purpose of administering or enforcing the antitrust laws of the Requesting Party (Articles II.H and VII.A).⁹
- 4.13 The proposed Agreement would also impose some financial obligations. Under Article XII, unless otherwise agreed, the Requested Party shall pay all the costs of executing a request, except for the fees of expert witnesses, the costs of translation, interpretation, and transcription, and the allowances and expenses related to travel to the territory of the Requested Party.
- 4.14 In Australia, US requests would be met from existing agency funds, principally those of the ACCC. In the event that the costs associated with complying with a request are substantial, the proposed Agreement allows the Parties to agree on other arrangements.¹⁰

Date of binding treaty action

- 4.15 The proposed Agreement will enter into force upon notification by each Party to the other that all domestic requirements to give effect to the Agreement have been met. It is proposed that Australia's notification be lodged as soon as possible after 27 September 1999.¹¹

Consultation

- 4.16 The States and Territories were consulted in April 1997 and generally supported the proposed Agreement. Some States were concerned whether differences between US and Australian antitrust laws might affect its operation. They were informed that it only established formal arrangements to facilitate the provision of assistance by Australia to US antitrust authorities. It did not extend the limits of assistance under existing Australian mutual assistance legislation. Differences between antitrust laws, therefore, would not affect its operations.¹²
- 4.17 The ACCC issued a media release on 18 April 1997, seeking comments on the proposed Agreement. Submissions were received from the Law Council of Australia, the Australian Chamber of Commerce and Industry

9 See NIA for Antitrust Agreement, pp. 3-4

10 NIA for Antitrust Agreement, p. 4

11 NIA for Antitrust Agreement, p. 1

12 NIA for Antitrust Agreement, p. 5

and the Canadian Bar Association, all of which indicated general support.¹³

Other evidence presented

- 4.18 In addition to the other matters in this Chapter, we took evidence on the following points about the proposed Agreement:
- the information exchanges it would provide for would take place under the mutual assistance laws in each country, not under antitrust or pro-competition laws. Therefore, any differences between those laws in each country would not pose difficulties for the operation of the proposed Agreement;¹⁴ and
 - it would not involve any changes to or extension of Australian competition law, nor does it imply any harmonisation of Australian and US laws;¹⁵
- 4.19 Mr Hank Spier, the Chief Executive Officer of the ACCC, argued that acceptance of the proposed Agreement would be of considerable advantage to Australia. As markets for goods and services become global, he said, there was an increasing need for competition laws to transcend national barriers, adding that international cooperation in enforcing competition law was critical to dealing with international cartels.¹⁶
- 4.20 He noted that the ACCC was involved in a number of international cartel investigations and cited a recent US case against a multinational vitamin company which resulted in a fine of \$US750 million for a ‘very serious cartel’. Mr Spier added that there was reason to believe that similar conduct may have occurred in the Australian market, and that any information that the US could supply would be helpful and speed up the ACCC’s investigations.¹⁷
- 4.21 In detailed material received after our hearing, the ACCC provided information on the number of mergers it had examined in recent financial years. For example, in 1996/97, a total of 147 mergers was examined and

13 NIA for Antitrust Agreement, p. 5

14 John Jepsen (Treasury), *Transcript of Evidence*, 23 August 1999, p. TR32

15 John Jepsen (Treasury), *Transcript of Evidence*, 23 August 1999, p. TR32. The ACCC provided a brief comparison of US and Australian competition law: see Exhibit 1, Annexure 2

16 *Transcript of Evidence*, 23 August 1999: Hank Spier (ACCC), pp. TR34, 38, John Jepsen (Treasury), p. TR32

17 Hank Spier (ACCC), *Transcript of Evidence*, 23 August 1999, pp. TR 34-35

140 were not opposed. Of the seven that were opposed, two were later resolved after the parties had addressed the ACCC's concerns.¹⁸

Conclusion and recommendation

- 4.22 We accept that international cooperation in law enforcement is essential in a global economy. The proposed Agreement would allow the ACCC and AGs to obtain information and evidence from the United States about possible breaches of Australia's competition laws. At present, this information is not available to Australian authorities.
- 4.23 By extending the reach of these investigatory agencies, the proposed treaty action would facilitate the enforcement of Australia's competition laws, and help combat the anti-competitive practices of international trading cartels.
- 4.24 We would welcome negotiation of similar agreements with other nations requiring treaty level agreements to permit the exchange of information.

Recommendation 4

- 4.25 **The Committee supports the proposed *Agreement between the Government of Australia and the Government of the United States of America on Mutual Antitrust Enforcement Assistance*, and recommends that binding treaty action be taken.**

¹⁸ Exhibit 1, p. 4 of Annexure 1. The ACCC also provided the Committee with details of its litigation record, including penalties awarded: see Exhibit 1, Annexure 3.

Food Aid Convention

Background

- 5.1 The Food Aid Convention 1999 (the 1999 Convention) is the latest in a series of Food Aid Conventions which have operated since 1968.
- 5.2 The Food Aid Convention was originally, and is still, is one of the constituent conventions of the International Grains Arrangement (now known as the International Grains Agreement).
- 5.3 The broad aim of the Convention has remained consistent over the years: to provide an assurance to developing countries of a minimum annual quantity of food aid, mainly in the form of grains. The Convention provides a mechanism through which developed grain importing countries and major grain exporting countries (like Australia) have taken a responsibility for providing food aid to the international community.

Proposed treaty action

- 5.4 The 1999 Convention maintains the objective of delivering an assured amount of food aid to developing countries over the next three years, irrespective of fluctuations in world food prices and supplies. The Convention continues many of the key features of earlier conventions, while seeking to improve the effectiveness of food aid and the efficiency of its delivery.
- 5.5 The new features of the 1999 Convention include measures designed to enable a wider range of traditional foodstuffs to be purchased as food aid

from developing countries (thereby promoting their agricultural development), to promote better health outcomes and to assist in the development of more effective supplementary feeding programs. Other measures include:

- greater emphasis on assessment of food aid needs, on monitoring of aid provided, and co-operation between food aid donors, recipients and others concerned;
- broadening the list of eligible products beyond grains, rice and pulses, to include edible oil, root crops, skimmed milk powder, sugar, seed for eligible products and products that are part of traditional diets or components of supplementary feeding programs;
- stronger provisions to cover transportation and other operational costs associated with food aid transactions;
- provisions to allow donors to express commitments in tonnage or in monetary value or in a combination of both;
- stronger provisions to promote local agricultural development in recipient countries; and
- requirements intended to increase the proportion of contributions provided in the form of grants or gifts, rather than loans with conditions attached.¹

5.6 A key element of the 1999 Convention is the continuing requirement that food aid not be tied in any way to commercial exports of goods or services to recipient countries.

5.7 The 1999 Convention supports Australia's trade policy goals by meeting World Trade Organisation (WTO) assurances on the continued availability of food aid to least-developed countries and food-importing developing countries. The Convention also assists in the implementation of the 1996 World Food Summit commitment to the achievement of food security for all and the eradication of hunger. These elements will be important influences in maintaining the engagement of developing countries in the on-going process of international agricultural trade reform.²

1 National Interest Analysis for the *Food Aid Convention*, p. 2 (hereafter the 'NIA for Food Aid')

2 NIA for Food Aid, p. 1

Obligations imposed by the treaty

- 5.8 Accession to the 1999 Convention would commit Australia to maintain its annual minimum contributions of 250 000 tonnes of food aid per annum until 2002. The cost of this commitment, including commodity, transport and other operational costs is \$90 million per year. Funding for this commitment will be provided through Australia's aid budget. There will be no additional budgetary implications for the Government.
- 5.9 Australia's core obligations under the 1999 Convention will not be substantially different in nature from those under previous Food Aid Conventions.³
- 5.10 Where the 1999 Convention has been modified (for example, to require better assessment of food needs and more effective planning and evaluation), the new requirements are consistent with the policies and practices used by the Australian Agency for International Development (AusAID) in delivering Australia's food aid program.
- 5.11 Unless specifically requested by the United Nations World Food Programme (or in other exceptional circumstances), the Convention is unlikely to have a significant impact on the composition of Australia's food aid program. AusAID does not envisage providing significant quantities of eligible commodities other than wheat, flour and rice.⁴

Date for binding treaty action

- 5.12 It is proposed that Australia's instrument of accession be deposited with the Secretary-General of the United Nations, as soon as practicable after 27 September 1999.
- 5.13 Instruments of accession were to have been deposited by 30 June 1999, but Australia and several other countries have been granted such an extension of one year to complete their domestic requirements.

3 NIA for Food Aid, p. 3 and p. 6

4 Ian Thompson, (Agriculture, Forestry and Fisheries Australia [AFFA]), *Transcript of Evidence*, 30 August 1999, p. TR49

Evidence presented

- 5.14 In addition to the matters discussed elsewhere in this Chapter, we took evidence at our hearing on the following issues:
- the role of the World Food Programme in advising countries on food aid priorities and assisting in the distribution of food aid;⁵
 - the importance of ensuring that food aid does not distort local food production or local economies;⁶
 - the Government's practice of purchasing wheat for food aid from Australian Wheat Board Ltd;⁷ and
 - the reluctance of aid donors to provide food aid which require sophisticated storage systems to maintain quality and the importance of providing food which satisfies the nutritional needs and matches the dietary habits of the recipients.⁸
- 5.15 There was also extensive discussion at the hearing and in a subsequent written submission from AusAID, on the cost of supplying food aid and on the decision making processes involved in determining the eligibility of countries for food aid and the methods of distributing that aid. These matters are considered below.

The cost of food aid

- 5.16 AusAID advised that the \$90 million value of Australia's food aid commitment is an indicative estimate only, based on past year expenditures. It is difficult to define the cost precisely because of the number of variable factors involved in delivering annually a minimum of 250 000 tonnes of food aid. These factors include:
- varying commodity prices;
 - between country transport costs;
 - in-country transport, distribution and storage costs;
 - whether the commodities are transported in bulk, bags or containers; and

5 Ali Gillies (AusAID), *Transcript of Evidence*, 30 August 1999, p. 50 and p. 56; Laury McCulloch (AusAID), *Transcript of Evidence*, 30 August 1999, p. TR53

6 Ali Gillies (AusAID), *Transcript of Evidence*, 30 August 1999, p. 56 and Laury McCulloch (AusAID), *Transcript of Evidence*, 30 August 1999, p. TR56

7 Ian Thompson (AFFA), *Transcript of Evidence*, 30 August 1999, p. TR55

8 Ali Gillies (AusAID), *Transcript of Evidence*, 30 August 1999, p. TR58

- whether there are cost sharing arrangements with partner governments or other organisations.⁹

5.17 In general terms, approximately 60 to 65 per cent of food aid expenditure is spent on food and the balance (around 35 to 40 per cent) is spent on transport and other operational costs. As food aid is usually needed in places where there is little infrastructure, these percentages can vary and the amount of food delivered per dollar can be quite low. For example, in the Sudan the costs could be in the order of 90 per cent for transport and operational costs and 10 per cent for food.¹⁰

5.18 The following table provides details of the costs involved in Australia's 1998/99 food aid commitment. In most cases the transport and on-costs are based on World Food Programme estimates.

Table 6.1 Examples of Costs Related to Australia's 1998/99 Food Aid Commitment

| Recipient | Food Type | Qty (tonnes) | FAC Wheat Equivalent (tonnes) | Value FOB* (\$A) | Transport and On-Costs (\$A) | Total Paid (\$A) |
|------------------------------|-----------|---------------|-------------------------------|-------------------|------------------------------|-------------------|
| Bilateral Development | | | | | | |
| Bangladesh | Wheat | 50,000 | 50,000 | 11,500,000 | 1,105,410 | 11,500,000 |
| SubTotal | | 50,000 | 50,000 | 11,500,000 | 1,105,410 | 11,500,000 |
| Emergency/Relief | | | | | | |
| Bangladesh | Wheat | 4,000 | 4,000 | 920,000 | 88,320 | 920,000 |
| Cambodia | Rice | 8,607 | 14,632 | 3,084,973 | 1,915,027 | 3,084,973 |
| China | Wheat | 4,290 | 4,290 | 925,279 | 74,669 | 925,279 |
| China | Wheat | 11,055 | 11,055 | 2,411,095 | 588,905 | 3,000,000 |
| Indonesia | Wheat | 45,000 | 45,000 | 11,011,500 | 998,451 | 11,011,500 |
| Indonesia | Rice | 12,322 | 20,947 | 5,524,736 | 1,470,745 | 5,524,736 |
| Philippines | Rice | 915 | 1,556 | 500,000 | See Note 1 | 500,000 |
| Philippines | Rice | 550 | 935 | 484,000 | See Note 1 | 484,000 |
| Sri Lanka | Rice | 1,132 | 1,924 | 452,234 | 131,070 | 452,234 |
| Sri Lanka | Rice | 3,100 | 5,270 | 1,238,450 | 479,959 | 1,238,450 |

⁹ AusAid, *Submission No. 1 on the Food Aid Convention*, Attachment A

¹⁰ Laury McCulloch (AusAID), *Transcript of Evidence*, 30 August 1999, p. TR54. See also AusAid, *Submission No. 1 on the Food Aid Convention*, Attachment A

| Recipient | Food Type | Qty (tonnes) | FAC Wheat Equivalent (tonnes) | Value FOB* (\$A) | Transport and On-Costs (\$A) | Total Paid (\$A) |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------|----------------|-------------------------------|-------------------|------------------------------------------------------------------------------------------------------------|-------------------|
| Sri Lanka | Pulses | 222 | 444 | 106,427 | 30,764 | 106,427 |
| Sri Lanka | Sugar | 106 | N/a | 46,582 | 14,388 | 46,582 |
| WPF/IRA | n/a | 1,765 | 1,765 | See Note 2 | 1,000,000 | 1,000,000 |
| SubTotal | | 93,064 | 111,818 | 26,705,276 | 6,792,298 | 28,294,181 |
| Multilateral Development - World Food Programme (WFP) | | | | | | |
| Bangladesh | Wheat | 36,500 | 36,500 | 8,384,050 | The combined total of Transport and On-Costs for WFP Multilateral Development Activities is as shown below | |
| China | Wheat | 32,000 | 32,000 | 7,034,400 | | |
| Egypt | Flour | 5,537 | 7,586 | 1,550,360 | | |
| Guinea | Rice | 3,252 | 5,528 | 1,456,896 | | |
| India | Rice | 2,203 | 3,745 | 987,033 | | |
| Sao Tome | Rice | 432 | 734 | 193,536 | | |
| Senegal | Rice | 626 | 1,064 | 284,032 | | |
| Sri Lanka | Rice | 1,065 | 1,811 | 477,120 | | |
| Syria | Flour | 4,243 | 5,813 | 840,000 | | |
| Vietnam | Flour | 3,202 | 4,387 | 902,964 | | |
| Vietnam | Flour | 9,463 | 12,964 | 2,649,640 | | |
| SubTotal | | 98,523 | 112,132 | 24,760,031 | | 15,837,372 |
| Grand Total | | 241,587 | 273,950 | 62,965,307 | 23,735,080 | 80,391,584 |
| Notes: | | | | | | |
| 1. These two programs were implemented by Australian NGOs. The rice was procured locally in the Philippines and the NGOs provided all in-country transport and distribution costs. | | | | | | |
| 2. The cost shown on this line is a cash contribution to the Immediate Response Account (IRA) of the International Emergency Food Reserve (IEFR). The FAC makes provision for half of the amount contributed to this account to be allowable as a contribution towards Australia's FAC obligations. The actual tonnage is based on the FAC's established price for wheat in the year of the donation. | | | | | | |
| 3. In 1998/99, the FAC has advised that one tonne of rice is equivalent to 1.7 tonnes of wheat. Similarly, one tonne of flour is equivalent to 1.37 tonnes of wheat. | | | | | | |
| * Free on Board - refers to the cost of grain loaded on the ship. | | | | | | |
| Source: AusAid, <i>Submission No. 1 on the Food Aid Convention</i> , Attachment A | | | | | | |

Making decisions about food aid

- 5.19 The 1999 Convention contains a list of the countries eligible to receive food aid under the provisions of the Convention. This list includes those countries described by the Development Assistance Committee of the OECD as aid recipients and those countries included in the WTO list of Net Food-Importing Developing Countries. The list currently includes 128 countries.
- 5.20 AusAID noted that the 1999 Convention provides a framework within which donor countries make separate decisions about what food aid they will provide.
- Essentially, the Convention sets out the rules of quality of food aid, what is actually eligible and who is eligible and countries agree to provide a particular minimum amount. In the case of Australia, we then go through a whole different set of processes to decide which countries will receive food aid, when they will receive it, what kinds of food and through what channels.¹¹
- 5.21 One of the factors taken into account by the Government in determining food aid priorities is an estimate from the World Food Programme of the food aid required to support its development and relief activities in the coming year. The publication is intended to help donor countries plan and budget for the assistance they intend to channel through the World Food Programme.¹²
- 5.22 By way of example, the following table shows the steps involved in the Government's decision making process. The table covers food aid for emergency relief operations. A similar table covering food aid provided under World Food Programme development projects appears at Appendix E.

11 Ali Gillies (AusAID), *Transcript of Evidence*, 30 August 1999, p. TR51

12 AusAID, *Submission No. 1 on the Food Aid Convention*, Attachment B

Table 6.2 Food Aid for Emergency and Relief Operations – decision making processes

| | |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Budget | Funds available for humanitarian and emergency relief purposes, including relief food aid, are determined annually in the context of the overseas aid budget as part of the Budget process. |
| Initial Draft of Recipient Countries and Proposed Allocations | A draft list of priority food aid operations (by countries) is prepared by AusAID based on information provided by Australia's overseas posts, DFAT, and following consultation with other agencies and NGOs. |
| Final Draft of Proposed Countries and Allocations | Following further consultation with Posts and other agencies, including NGOs, a final draft of priority food aid countries and allocations for on-going relief and emergencies requiring food aid is prepared. |
| Ministerial Approval | A submission is prepared for approval by the Minister of Foreign Affairs outlining the proposed expenditure by country. |
| Source of Commodities and Shipping Arrangements | Relief agencies on the ground require maximum flexibility to be able to respond to emergencies. Cash contributions to relief agencies, like World Food Programme for the purchase of emergency food aid, are usually the most effective way of providing rapid assistance. In most cases, emergency food supplies are purchased in the locality of the emergency, where possible. |
| Ministerial Approval of Individual Operations | After consulting closely with World Food Programme, recommendations are made to the Minister for Foreign Affairs on the most effective way of assisting including recommendations on source of supply and costs for individual operations. |
| Implementation | |
| <p>Note: This process outlines the steps for on-going relief (eg refugees) and longer-term operations resulting from earlier emergencies. Other emergency relief efforts are considered on a case-by-case basis and are addressed in separate submissions to the Minister for Foreign Affairs.</p> | |
| <p>Source: AusAid, <i>Submission No. 1 on the Food Aid Convention</i>, Attachment A</p> | |

Conclusions and recommendation

- 5.23 The Food Aid Convention is a long-standing and effective humanitarian agreement.
- 5.24 The Convention's aims of contributing to world food security and improving the capacity of the international community to respond to emergency food situations and other food needs of developing countries are just as valid now as they were when the Convention was first established in 1968.
- 5.25 The 1999 Convention contains a number of enhancements, to the advantage of both donor and recipient countries. The new provisions allow donor countries greater flexibility, while at the same time making a wider range of foodstuffs available to recipient countries. The measures aimed at encouraging donor countries to clearly evaluate food needs and development objectives when planning their food aid are also valuable initiatives.
- 5.26 The 1999 Convention is consistent with Australia's food aid policy and practices and supports our international trade policy objectives. While accession would not increase Australia's food aid obligations, it would reaffirm our commitment to the humanitarian and development assistance needs of recipient countries.

Recommendation 5

- 5.27 **The Committee supports the proposed *Food Aid Convention*, and recommends that binding treaty action be taken.**

Double Taxation Arrangements with South Africa and Malaysia

Introduction

- 6.1 This Chapter addresses three proposed treaty actions relating to double taxation agreements (DTAs):
- a proposed *Agreement with South Africa for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income*;
 - a proposed Protocol to amend the *Agreement with Malaysia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income*; and
 - an *Exchange of Letters constituting an Agreement to extend the Application of Certain Provisions of Article 23 of the Double Taxation Agreement with Malaysia*.

Double taxation agreements

- 6.2 Australia has a growing network of bilateral income tax treaties aimed at reducing or eliminating double taxation caused by overlapping tax jurisdictions. These arrangements seek to prevent the double taxation of income received by a resident of one of the parties to the agreement from activities conducted in the country of the other party. This is achieved by separating the parties' taxing powers and, in certain circumstances, by giving credits for the payment of tax in the other country.

- 6.3 DTAs are designed to eliminate possible barriers to trade and investment and, as a result, to promote closer economic cooperation with our major trading partners. In addition, they create a framework for exchange of information and cooperation between tax administrations, thereby combating international tax avoidance and evasion.¹
- 6.4 In general, the DTAs negotiated by Australia follow the structure of a model described in the *OECD Model Tax Convention on Income and on Capital*. There are, however, a number of instances where Australian practice draws on the *United Nations' Model Double Taxation Convention between Developed and Developing Countries*. This is because the United Nations' model, which is generally more inclined towards source country taxing rights, better matches our interests as a net capital importer. The OECD model is biased towards residence country taxing rights.²
- 6.5 Australia has double taxation and tax avoidance agreements with 36 other countries, including Vietnam, France, West Germany, New Zealand, the United States, China, Papua New Guinea, Finland and the United Kingdom. The agreement with Malaysia is already in place and the proposed agreement with South Africa will be the 37th.³

Proposed Agreement with South Africa

Proposed treaty action

- 6.6 A DTA with South Africa was proposed for various reasons. Firstly, to promote closer economic cooperation between Australia and South Africa. South Africa is Australia's 21st largest trading partner and is the 18th largest source of investment income.⁴
- 6.7 Secondly, the proposed DTA will facilitate existing trade and investment by providing a reasonable element of legal and fiscal certainty. Thirdly, it will help in the creation of a legal framework through which the tax administrations of Australia and South Africa can work together to prevent international fiscal evasion.

1 Ken Allen (ATO), *Transcript of Evidence*, 30 August 1999, p. TR68

2 Ken Allen (ATO), *Transcript of Evidence*, 30 August 1999, p. TR69 and NIA for the *Agreement with South Africa for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income*, p. 2, (hereafter the 'NIA for Double Tax Agreement with South Africa')

3 Ken Allen, (ATO) *Transcript of Evidence*, 30 August 1999, p. TR70. There are DTAs in place with 18 of Australia's top 20 trading partners. The two countries with whom DTAs have not yet been negotiated are Hong Kong (SAR) and Luxembourg. The negotiation of DTAs with these countries is currently being considered by the Government (see ATO, *Submission No. 4*, p. 1)

4 Ken Allen (ATO), *Transcript of Evidence*, 30 August 1999, p. TR70

- 6.8 While in general terms the proposed Agreement is similar to other DTAs, there are some differences which reflect the territorial tax system found in South Africa, where income tax applies only in relation to income that is sourced in South Africa. This regime is different from Australia and most other countries, where residents are taxed on a worldwide system. This treaty also differs from other DTAs in relation to the treatment of outgoing dividends and pensions.⁵
- 6.9 It contains the standard tax treaty provisions relating to the taxing of business profits derived by residents of the other country and that both countries agree on methods of reducing double taxation where both countries have a right to tax. It also provides for an agreed basis for determining whether the income returned or expenses claimed on related party dealings by members of a multinational group operating in both countries can be regarded as acceptable.
- 6.10 The National Interest Analysis (NIA) covers in some detail the points of similarity and difference between the model Agreement and the proposed DTA with South Africa.

Obligations imposed by the treaty

- 6.11 The proposed Agreement requires the two Governments to relieve double taxation of cross-border income in accordance with its terms.
- 6.12 It contains two most favoured nation provisions: one in respect of the future acceptance by Australia of a Non-Discrimination Article in an agreement with a third State. The other relates to South Africa, agreeing to the reduction of its secondary tax on companies in a future tax treaty with a third State. In both instances, the party triggering the clause is required to afford similar treatment to the other party.
- 6.13 The proposed Agreement also establishes procedures for the mutual resolution of any issues that may arise and for the exchange of information.
- 6.14 In general, it does not impose any greater obligations on residents of Australia than Australia's domestic law would otherwise require. It is not expected to result in increased administration or compliance costs. Nor are there expected to be significant impact on revenue collected.

Date of binding treaty action

- 6.15 The proposed Agreement will enter into force following an exchange of notes between the parties advising that domestic requirements have been met for entry into force.

5 Ken Allen (ATO), *Transcript of Evidence*, 30 August 1999, pp. TR70-1

- 6.16 For Australia, it will be necessary to incorporate the text of the Protocol as a schedule to the *International Tax Agreements Act 1953* before binding action can be taken. It is expected that Australia will deliver its note to South Africa by the end of 1999.

Proposed amendments to the Agreement with Malaysia

Proposed treaty action

- 6.17 The Protocol is intended to amend the *Double Taxation Agreement with Malaysia* (known as the 1980 Agreement) in a number of important respects:
- to overcome the double taxation situation currently facing Australian residents who are in receipt of fees for technical services paid by Malaysian residents;
 - to extend from 1 July 1987 until the 1991/92 year of income the operation of the tax sparing provisions of the 1980 Agreement;
 - to include an anti-avoidance provision which applies where shares or partnership or trust interest, the value of which is principally attributable to land, are alienated; and
 - to update the 1980 Agreement to bring it into line with Australia's current law and treaty policies.
- 6.18 The Exchange of Letters will extend the tax sparing provisions in the 1980 Agreement, which apply in relation to certain income derived by Australian residents that Malaysia exempts or taxes at a reduced rate under special incentive measures expired on 30 June 1984. The letters will extend the operation of these provisions to 30 June 1987. These tax sparing provisions will be replaced with new tax sparing measures described in the proposed Protocol.

Obligations imposed by the Protocol and Exchange of Letters

- 6.19 No greater obligations will be imposed on Australian residents by the 1980 Agreement, the proposed Protocol or the proposed Exchange of Letters than Australia's domestic tax laws would otherwise require.
- 6.20 The major elements of the proposed Protocol are set out in the NIA, and include:

- a requirement that the two Governments relieve double taxation of cross-border income in accordance with the terms of the 1980 Agreement;
- a most favoured nation provision providing that, if Australia should subsequently conclude an agreement with a third country granting more favourable treatment in relation to certain measures, the two Governments will enter into negotiations with a view to providing similar treatment to Malaysia;
- a requirement that, where any provision of the 1980 Agreement that is effected by the Protocol would have afforded any greater relief from tax than is afforded by the amendments made by the Protocol, that provision is to continue to have effect in both countries before the entry into force of the Protocol;
- a provision that new or additional incentives may be tax spared, after evaluation and acceptance by Australia; and
- provision for a subsequent extension of the tax sparing benefits beyond June 1992.

Date of binding treaty action

- 6.21 The proposed Protocol will enter into force following an exchange of notes between the parties advising that domestic requirements for entry into force have been met.
- 6.22 As with the South African DTA, it will be necessary for Australia to incorporate the text of the Protocol as a schedule to the *International Tax Agreements Act 1953* before binding action can be taken. It is proposed that Australia deliver its note to Malaysia by the end of 1999.
- 6.23 The Exchange of Letters will take effect on the date on which the letters are actually exchanged, which is proposed by the end of 1999.

Evidence presented

Article 10.6 of the proposed agreement with South Africa

- 6.24 Richard Shaddick, for the Taxation Institute of Australia, questioned whether the rate of tax should be reduced to 0 per cent where profits have already been subject to company income tax in Australia. Mr Shaddick suggested that such an approach:

... would then align the Australian taxation of Australian branch profits of a South African company with those of an Australian

resident subsidiary of a South African company. Such a subsidiary can 'frank' dividend payments, but a branch of a non-resident company cannot.⁶

- 6.25 The Australian Taxation Office (ATO) recognises that Article 10.6(c) represents a negotiated compromise and comments that the maximum 5 per cent rate preserves, but limits, an Australian taxing right (only Australia currently asserts this right) and is designed to effectively mirror the 5 per cent limitation on the taxing right preserved by Article 10.7 that only South Africa currently asserts. Australia currently has no Branch Profits Tax.⁷

Article 13 of the proposed agreement with South Africa

- 6.26 Article 13 refers to income, profits or gains from the alienation of real property which may be taxed in full by the State in which the property is situated. The proposed Agreement is the first to include revised provisions designed to address the issues raised by the Federal Court in the *Lamesa Holdings* case. Under this judgement the Full Court decided that real property held by a non-resident through a chain of companies did not fall within the terms of the alienation of real property provision in the Australia/Netherlands double tax agreement.⁸
- 6.27 The impact of this decision means that Article 13 applies where real property is held through a company but does not apply where the real property is held through a company at the bottom of a chain of companies and one of the higher tier companies is alienated. This decision has implications for all of Australia's double tax agreements and highlights opportunities for non-residents to escape Australian taxation on profits from the sale of real property and mining rights in Australia by the use of a chain of holding companies or trusts.⁹
- 6.28 In its submission, the Australian-Southern Africa Business Council (ASABC) raised some specific issues relating to Article 13:
- in the context of where the value of the assets of a company is principally attributable to real property situated in the other contracting State may be taxed, there is no definition of 'principally' in the DTA. In domestic tax cases this has been deemed to be more than 50 per cent;¹⁰

6 Taxation Institute of Australia, *Submission No. 2 to the Double Tax Agreement with South Africa*, p. 1

7 ATO, *Submission No. 4, Double Tax Agreements*, Appendix F

8 *Commissioner of Taxation v Lamesa Holdings BV* 97 ATC 4752

9 NIA for the *Double Tax Agreement with South Africa*, p. 4

10 Article 13 states: Income, profits or gains derived by a resident of a Contracting State from the alienation of any shares or other interests in a company, or of an interest of any kind in a partnership or trust or other entity, where the value of the assets of such entity, whether they are held directly or indirectly (including through one or more interposed entities, such as, for

- is it possible that a person could not have any interest in a trust but could still benefit from the alienation rule?; and
 - situations may arise where there are no gains on the transfer of the shares (due to losses on other investments) but the value of the real property has increased substantially. If this occurred there would be no tax imposed.¹¹
- 6.29 In response to the first issue, the ATO noted that the word 'principally' is the same one used in Article 13.4 of the *United Nations' Model Double Tax Convention between Developed and Developing Countries*, on which the relevant provision of the proposed South African DTA is based, and which represents widespread international practice. As Australian courts have recognised, treaties are a product of negotiation and compromise, and their provisions often lack the precision of domestic legislation. The ATO, did however, undertake to consider the implications of the ASABC's comments in future negotiations.¹²
- 6.30 The question of whether it is possible that a person could not have any interest in a trust but could still benefit from the alienation rule is not seen as a problem in the context of Article 13.4. The ATO suggests that the use of Article 13.4 use is sufficient to address effective alienations of real property through the transfer of ownership of the holding entity. It sufficiently covers those benefiting from the alienation, without covering those not having an interest but merely, for example, brokering a sale.
- 6.31 With regard to the lack of gains on the transfer of shares the provision ensures that Australia has a taxing right under the DTA. However:
- If there were a gain on, for example, an alienation of shares, then it would not matter for the purposes of this taxing right, that there were losses on other investments. If, however, there was no gain on the alienation, for whatever genuine reason, the provision would not operate.¹³
- 6.32 Richard Shaddick sought clarification of Article 13.4 about Australia's right to tax gains from the disposal of shares is extended to shares in companies not resident in Australia. If so, would this be an extension of

example, through a chain of companies), **is principally attributable** to real property situated in the other Contracting State, may be taxed in that other State.

11 ASABC, *Submission No. 1 to the Double Tax Agreement with South Africa*, p. 1

12 ATO, *Submission No. 4, Double Tax Agreements*, Attachment F

13 ATO, *Submission No. 4*, 7 September 1999, Attachment F

Australia's domestic law and should it be publicly acknowledged as such.¹⁴

- 6.33 The ATO considers that the residence status of a company, the shares in which are alienated, is not an issue in this provision. The nexus with Australia is the direct or indirect alienation of Australian property.¹⁵

Article 5(4) of the proposed Protocol with Malaysia

- 6.34 In his submission for the Taxation Institute of Australia, Richard Shaddick questioned the proposed amendment to Article 5(4) of this DTA. He suggested that it does not explicitly prevent Malaysia from resuming its former practise of taxing technical service fees as 'royalties', especially where the services are provided by residents from Australia.¹⁶
- 6.35 The ATO commented that it is not always possible to cover every issue in a treaty specifically, as other countries often prefer to deal with an issue less formally. It added that this does not carry any suggestion that they are unwilling to reach an understanding that will govern their future practice. Pressing the point too much might result in the issue being dealt with in neither the Agreement nor by less formal assurances.¹⁷

Community consultation in the development of double taxation agreements

- 6.36 In its *7th Report* (March 1997), the former Committee commented at length on the nature and extent of community consultation involved in the development of DTAs. It noted that the ATO's industry consultation mechanisms had fallen into disuse and that the views of the professional accounting bodies had not been sought. It was also highly critical of the quality and usefulness of the national interest analysis presented in support of the proposed treaty action.¹⁸
- 6.37 The former Committee again commented on the importance of community and industry consultation in its *Thirteenth Report* (March 1998), when considering amendments to the DTA with Finland.¹⁹ In that Report, it noted that the ATO had taken steps to reinvigorate its consultative procedures.

14 Taxation Institute of Australia, *Submission No. 2 to the Double Tax Agreement with South Africa*, p. 3

15 ATO, *Submission No. 4, Double Tax Agreements*, Attachment F

16 Taxation Institute of Australia, *Submission No. 2 to the Double Tax Agreement with Malaysia*, p. 3

17 ATO, *Submission No. 4, Double Tax Agreements*, Attachment F

18 Joint Standing Committee on Treaties, *Australia's Withdrawal from UNIDO & Treaties tabled on 11 February 1997, 7th Report*, p. 25

19 Joint Standing Committee on Treaties, *Thirteenth Report*, pp. 50-54

- 6.38 In the light of this experience, we are pleased to note that the ATO seems to be continuing to develop better approaches to community consultation.
- 6.39 In 1997, after tabling of the 7th Report, the ATO established a Treaties Advisory Panel (TAP) to assist the consultation process. The TAP makes recommendations to government about which countries Australia may negotiate DTAs with and provides input on a range of other issues associated with the development of DTAs. Through the TAP, industry representatives are:²⁰
- consulted about the proposals to modify our approach to reach an agreement. Once the agreement is negotiated at officials level, they are also consulted prior to recommending to government that they go ahead with signature.²¹
- 6.40 In situations where certain aspects of the negotiations may compromise the other party's position, members of the TAP have given an undertaking to keep the contents confidential. Advance copies of the draft agreements are distributed to the panel to provide an opportunity to identify the areas to be pursued at the next meeting.²²
- 6.41 The Institute of Chartered Accountants referred favourably to the TAP processes when it noted, in a submission, that 'the ATO appears to have addressed the issues raised at the first TAP meeting.'²³

Other issues

- 6.42 In addition to the matters discussed elsewhere in this Chapter, at our public hearing we took evidence:
- on the protracted negotiations involved in the Protocol to the Double Taxation Agreement with Malaysia;²⁴
 - on the difficulty of calculating accurately the tax costs and benefits of double taxation treaties;²⁵
 - on the high value, in trade, investment, development cooperation and political terms, that governments have traditionally placed on the

20 The ATO provided details of the membership and terms of reference of this panel and these are included in Appendix F to this Report.

21 Ken Allen (ATO), *Transcript of Evidence*, 30 August 1999, p. TR73

22 Ken Allen (ATO), *Transcript of Evidence*, 30 August 1999, p. TR73

23 Institute of Chartered Accountants in Australia, *Submission No. 3 to the Double Tax Agreement with Malaysia*, 30 August 1999

24 Ken Allen (ATO), *Transcript of Evidence*, 30 August 1999, p. TR72

25 Ken Allen (ATO), *Transcript of Evidence*, 30 August 1999, p. TR73

negotiation of double taxation agreements with our trading partners; and²⁶

- on the operation of section 4 of the *International Tax Agreements Act 1953*, which provides that where there is an inconsistency between the terms of a treaty and domestic law, the treaty shall prevail.²⁷

6.43 The Australia-Malaysia Business Council (AMBC) was very supportive of the proposed Protocol and Exchange of Letters in relation to the DTA with Malaysia. Its Executive Director, Paul Gallagher, noted that the scope and value of the commercial relationship between Australia and Malaysia has 'grown dramatically' since negotiations on the matters covered by the proposed treaty action first began. He went on to argue that:

It would be beneficial for this amendment to the agreement to be approved speedily and for the next phase of negotiations to be instituted.²⁸

Conclusions and recommendations

6.44 We support the negotiation of DTAs with our trading partners. They are a potentially valuable means of expanding commercial opportunities for Australian companies and increasing two-way trade. They are also valuable to the extent that they help combat international fiscal evasion.

6.45 Both South Africa and Malaysia are significant trading partners for Australia and any measures which help secure a favourable environment for exporters, investors and potential joint venture partners are worthy of support.

Recommendation 6

6.46 **The Committee supports the proposed *Agreement with South Africa for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income*, and recommends that binding treaty action be taken.**

26 Ken Allen (ATO), *Transcript of Evidence*, 30 August 1999, p. TR69; see also Michael Nugent (ATO), *Transcript of Evidence*, 30 August 1999, p. TR84

27 Ken Allen (ATO), *Transcript of Evidence*, 30 August 1999, p. TR78

28 AMBC, *Submission No. 1 to the Double Tax Agreement with Malaysia*, p.1

Recommendation 7

- 6.47 **The Committee supports the proposed *Protocol to amend the Agreement with Malaysia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income*, and recommends that binding treaty action be taken.**

Recommendation 8

- 6.48 **The Committee supports the proposed *Exchange of Letters constituting an Agreement to extend the Application of Certain Provisions of Article 23 of the Agreement with Malaysia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income*, and recommends that binding treaty action be taken.**

6.49 The ATO has responded well to earlier criticisms of its approach to community consultation. The TAP seems to be an effective way of seeking community and industry involvement in the development of double taxation agreements. We also found the NIAs prepared for these treaty actions to be useful.

6.50 Nevertheless, there can be improvements to what are already effective processes. The ATO could, for example, seek to ensure that industry or business organisations with a country-specific interest are involved in DTA negotiations with that country. In this instance, organisations such as the AMBC and the ASABC may have had valuable experience to contribute to these treaty development processes. We acknowledge that, on occasions, it is necessary to maintain a degree of confidentiality in treaty negotiations. As the work of the TAP has demonstrated, such consultations are not impossible.

Recommendation 9

- 6.51 **The Committee recommends that the Australian Taxation Office extend its community and industry consultation program by inviting representatives of country-specific business organisations to participate in meetings of the Treaties Advisory Panel when treaty proposals relating to those countries are being considered.**

Adoption of Uniform Technical Prescriptions for Wheeled Vehicles

Background

- 7.1 The proposed *Agreement concerning the Adoption of Uniform Technical Prescriptions for Wheeled Vehicles, Equipment and Parts and Conditions for Reciprocal Recognition of Approvals Granted on the basis of these Prescriptions* (hereafter 'the Agreement') was first developed by the United Nations Economic Commission for Europe (ECE) after the Second World War. It was intended to enhance technical uniformity for motor vehicles, equipment and parts between European countries, although it was also open to non-European countries.
- 7.2 This proposed Agreement provides a avenue for the development of road vehicle technical regulations relating to safety and emission standards and a mechanism to allow for the mutual recognition of approvals issued under the Agreement.
- 7.3 By 1995, the working party responsible for managing the Agreement had become the de facto world leader in the harmonisation of vehicle technical standards and the Agreement was amended to encourage participation by non-European countries. Thirty-three countries are now party to the proposed Agreement, including most European countries and Japan. The Republic of Korea has announced its intention to accede, and a number of ASEAN countries are moving to accept the standards provided for by the Agreement.¹

1 John McLucas (Department of Transport and Regional Services [DTRS]), *Transcript of Evidence*, 30 August 1999, p. TR80; NIA for an *Agreement concerning the Adoption of Uniform Technical Prescriptions for Wheeled Vehicles, Equipment and Parts and the Conditions for Reciprocal Recognition of Approvals Granted on the Basis of these Prescriptions* (hereafter 'NIA for wheeled vehicles').

- 7.4 The Regulations made pursuant to the Agreement (known as ECE Regulations) deal with safety, emissions and anti-theft devices for motor vehicles and trailers. The Regulations can include test methods by which performance requirements are demonstrated, conditions for granting approval and the reciprocal recognition of approvals.

Reasons for the proposed treaty action

- 7.5 While Australia was one of the first countries to develop a comprehensive set of road vehicle technical standards, there are advantages to be gained from moving towards an international system for such standards.
- 7.6 The principal benefit lies in the capacity of international standards to assist Australian automotive exports, which amounted to some \$2.6 billion in 1998. Greater international harmonisation of design rules and of procedures for compliance certification will reduce production costs and allow freer competition. For Australian exporters, the costs involved in redesigning, retooling and re-certification to meet different international standards can be prohibitive. In effect, they represent a barrier to trade.
- 7.7 Consumers are also likely to benefit from accession to the Agreement as a result of the potential for lower prices and earlier access to innovative designs.²
- 7.8 It is argued in the National Interest Analysis (NIA) prepared in support of this treaty action that Australia's capacity to influence the development of uniform technical standards and reciprocal recognition arrangements will be enhanced if Australia accedes to the Agreement and becomes an active member of the forum it provides.
- 7.9 The NIA notes that while the Agreement duplicates some provisions in the recently concluded Mutual Recognition Agreements on Conformity Assessment with the European Union and with Iceland, Liechtenstein and Norway, in other respects the agreements are complementary. The provisions of the agreements do not conflict.³

2 John McLucas (DTRS), *Transcript of Evidence*, 30 August 1999, p. TR80. See also NIA for Wheeled Vehicles, p. 3

3 We considered these Mutual Recognition Agreements in our *Fifteenth Report* (June 1998), *Report 20* (March 1999) and *Report 22* (June 1999).

Obligations imposed by the Agreement

- 7.10 The Agreement establishes various procedures dealing with:
- issuing of approvals to ECE Regulations;
 - acceptance of approvals issued by other contracting parties;
 - providing defect advice if approved products are found not to comply with ECE Regulations and taking action to rectify problems if such advice is received from other parties; and
 - advising other parties of approvals that have been refused or withdrawn.
- 7.11 Although the Agreement does not allow parties to apply only part of an ECE Regulation, it does allow new parties to declare that they shall not be bound by any or some of the existing Regulations. Such reservations maybe withdrawn at any time.
- 7.12 Australia proposes to accede to the Agreement without applying any of the ECE Regulations immediately.
- 7.13 No decisions about which ECE Regulations will be accepted will be made until after the current Australian Design Rules are reviewed by the Commonwealth, State and Territory Governments and the results of the review endorsed by the Council of Australian Governments. This review process is intended to ensure that Australian Design Rules are fully aligned with ECE Regulations only where the Regulations are appropriate to community expectations and industry needs.
- 7.14 All States and Territories have been consulted and support accession, as do many key players in the automotive industry.⁴
- 7.15 Accession to the Agreement will not change the respective roles of the Commonwealth, State and Territory Governments in relation to motor vehicle standards development or regulation.

Proposed date of treaty action

- 7.16 It is proposed that Australia accede to the Agreement, without immediately accepting the ECE Regulations, as soon as practicable after 27 September 1999. The Agreement will enter into force for Australia on

⁴ John McLucas (DTRS), *Transcript of Evidence*, 30 August 1999, p. TR80

the sixtieth day after Australia's instrument of accession is deposited with the United Nations Secretary-General.

Evidence presented

- 7.17 In addition to taking evidence on the proposed accession at a public hearing, we received a submission on the matter from the Minister for Transport and Regional Services, the Hon John Anderson MP.
- 7.18 The Minister noted that the Agreement clearly contemplates the sort of process envisaged by Australia: that is, accession with delayed acceptance of the ECE Regulations. He also argued that each ECE Regulation eventually adopted by Australia should not be considered to be a separate treaty action, but rather an implementation action within the overall framework of the treaty.
- 7.19 The Minister emphasised that individual ECE Regulations would be accepted only after thorough industry and public scrutiny. This will occur mainly through the review of the Australian Design Rules, which has already commenced. It is expected that the review will be completed progressively over the next 18 months to two years. Where an ECE Regulation is accepted as mandatory, it will be prescribed as disallowable instruments under the *Motor Vehicle Standards Act 1989*. This will expose the regulation to the further transparency of Regulation Impact Statements and tabling in Parliament.
- 7.20 The Minister concluded by giving an undertaking that, whenever an ECE Regulation is applied in Australia, he would advise this Committee.
- 7.21 At the public hearing, we discussed the review process at some length. We were concerned that Australia's high standards for vehicle manufacture might be diluted by the application of ECE Regulations. Officials from the Department of Transport and Regional Services advised us that the Australian Design Rule Review process would provide an open and transparent means of ensuring that ECE standards are appropriate to Australian conditions and expectations.⁵

5 John McLucas (DTRS), *Transcript of Evidence*, 30 August 1999, p. TR84

Conclusion and recommendation

- 7.22 There are advantages to be gained from the international acceptance of uniform technical requirements for motor vehicles. For Australian automotive manufacturers the widespread adoption and mutual recognition of uniform standards will help reduce production costs and open new export markets. For Australian consumers these standards could lead to lower retail costs and earlier access to new products.
- 7.23 By acceding to this Agreement Australia's capacity to influence the development and adoption of uniform technical requirements will be enhanced.
- 7.24 It is, however, a prudent step not to adopt all ECE Regulations at the outset. It is important that the Australian community be allowed to review all existing Australian Design Rules and all proposed ECE Regulations to ensure that our safety and emission rules are not diluted and that individual ECE Regulations are appropriate to Australian conditions.
- 7.25 The proposal that Australian Design Rules be aligned with ECE Regulations progressively and only after thorough and public review is sensible. It is important that this review process involve not just the relevant Commonwealth, State and Territory ministers but also involve as many motoring, consumer and industry related organisations as possible. Only by wide public involvement will community confidence in the outcome be engendered.

Recommendation 10

- 7.26 **The Committee supports the proposed *Agreement concerning the Adoption of Uniform Technical Prescriptions for Wheeled Vehicles, Equipment and Parts and the Conditions for Reciprocal Recognition of Approvals Granted on the Basis of these Prescriptions*, and recommends:**
- **that binding treaty action be taken; and at the same time**
 - **that a declaration be issued advising that the Australian Government will not be bound by any of the Regulations annexed to the Agreement until further notification is given.**
- 7.27 We accept the Minister's proposition that each action to adopt an ECE Regulation should be considered to be implementation action within the overall framework of the treaty, rather than a separate treaty action. This acceptance is given on the proviso that community participation in the

regulation review process is wide and effective and that the usual Regulation Impact Statement and parliamentary scrutiny opportunities are available for each regulatory action.

- 7.28 We also accept the Minister's offer to advise this Committee on each occasion that regulatory action is taken to align the Australian Design Rules with ECE Regulations.

ANDREW THOMSON MP

Committee Chairman

21 September 1999



Appendix A - Extract from Resolution of Appointment

The Joint Standing Committee on Treaties was reconstituted in the 39th Parliament on 9 December 1998.

The Committee's Resolution of Appointment allows it to inquire into and report upon:

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



Appendix B - Submissions

Fourth Amendment to the Articles of Agreement of the International Monetary Fund

| Submission No | Organisation |
|---------------|----------------------------|
| 1 | Department of the Treasury |

Food Aid Convention

| Submission No | Organisation |
|---------------|--------------|
| 1 | AusAID |

Double Taxation Agreement between Australia and the Republic of South Africa

| Submission No | Organisation |
|---------------|-------------------------------------------------|
| 1 | Australian-Southern Africa Business Council |
| 2 | Taxation Institute of Australia |
| 3 | Institute of Chartered Accountants in Australia |
| 4 | Australian Taxation Office |

Protocol to amend the Double Taxation Agreement between Australia and Malaysia and Exchange of Letters to extend the Application of Certain Provisions of Article 23 of the Double Taxation Agreement with Malaysia

| Submission No | Organisation |
|---------------|-------------------------------------------------|
| 1 | Australia-Malaysia Business Council |
| 2 | Australian Taxation Institute |
| 3 | Institute of Chartered Accountants in Australia |
| 4 | Australian Taxation Office |

Agreement concerning the Adoption of Uniform Technical Prescriptions for Wheeled Vehicles, Equipment and Parts and Conditions for Reciprocal Recognition of Approvals Granted on the basis of these Prescriptions

| Submission No | Organisation |
|---------------|--------------------------|
| 1 | The Hon John Anderson MP |



Appendix C - Witnesses at Public Hearings

Monday, 23 August 1999, Canberra

Department of Foreign Affairs and Trade

David Mason, Executive Director, Treaties Secretariat, International Organisations and Legal Division

Proposed Agreement to Amend the Scientific and Technical Cooperation Agreement with the European Community

Department of Industry, Science and Resources

Karl Baigent, Senior Project Officer, International Science and Technology Policy Branch

Peter De Souza, Assistant Manager, International Science and Technology Policy Branch

Eric James, General Manager, International Science and Technology Policy Branch

Fourth Amendment to the Articles of Agreement of the International Monetary Fund

Treasury

Vanessa Beenders, Specialist, International Monetary Fund Unit

Karen Spindler, General Manager, International Finance Division

Proposed Agreement with the USA on Mutual Antitrust Enforcement Assistance

Treasury

John Jepsen, General Manager, Structural Reform Division

Australian Competition and Consumer Commission

Hank Spier, Chief Executive Officer

Tony Wing, Assistant General Counsel

Attorney-General's Department

Michael Manning, Senior Legal Officer, International Branch, Criminal Law Division

Annette Willing, Principal Legal Officer, International Branch, Criminal Law Division

Monday, 30 August 1999, Canberra**Department of Foreign Affairs and Trade**

David Mason, Executive Director, Treaties Secretariat,

Attorney-General's Department

Mark Zanker, Assistant Secretary, International Trade and Environment Law Branch

Food Aid Convention**Department of Agriculture, Fisheries and Forestry**

Keith Jones, Manager, Industrial Crops and International Section, Field Crops Branch

Ian Thompson, Assistant Secretary

AusAID

Ali Gillies, Branch Head, Africa and Humanitarian Relief Branch,

Laury McCulloch, Director, Pacific Contracts and Policy Section

Department of Foreign Affairs and Trade

John Watts, Executive Officer, Agriculture Branch

Double Taxation Agreement with South Africa, Protocol amending the Double Taxation Agreement with Malaysia and an Exchange of Letters to Extend the Application of Certain Provisions of Article 23 of the Double Taxation Agreement with Malaysia

Australian Taxation Office

Ken Allen, Assistant Commissioner, International Tax Division

Carolyn Janz, Senior Adviser, Treaties Unit, International Tax Division

Michael Lennard, Manager, Treaties International Division

Li Li Teh, Adviser, Treaties Unit, International Tax Division

Michael Nugent, Senior Adviser, Treaties Unit, International Tax Division

Agreement Concerning the Adoption of Uniform Technical Prescriptions for Wheeled Vehicles, and the Conditions for Reciprocal Recognition of Approvals Granted on the basis of these Prescriptions

Department of Transport and Regional Services

Allan Jonas, Executive Officer, Vehicle Safety Standard

John McLucas, Vehicle Safety Standards



Appendix D – Exhibits

Fourth Amendment to the Articles of Agreement of the International Monetary Fund

Exhibit No

1. 'The IMF and World Bank: Time to Merge' by James B Burnham, *The Washington Quarterly*, Spring 1999, Vol 22, No2, pp. 101-111
2. *Task Force on International Reform: Report*, 1998

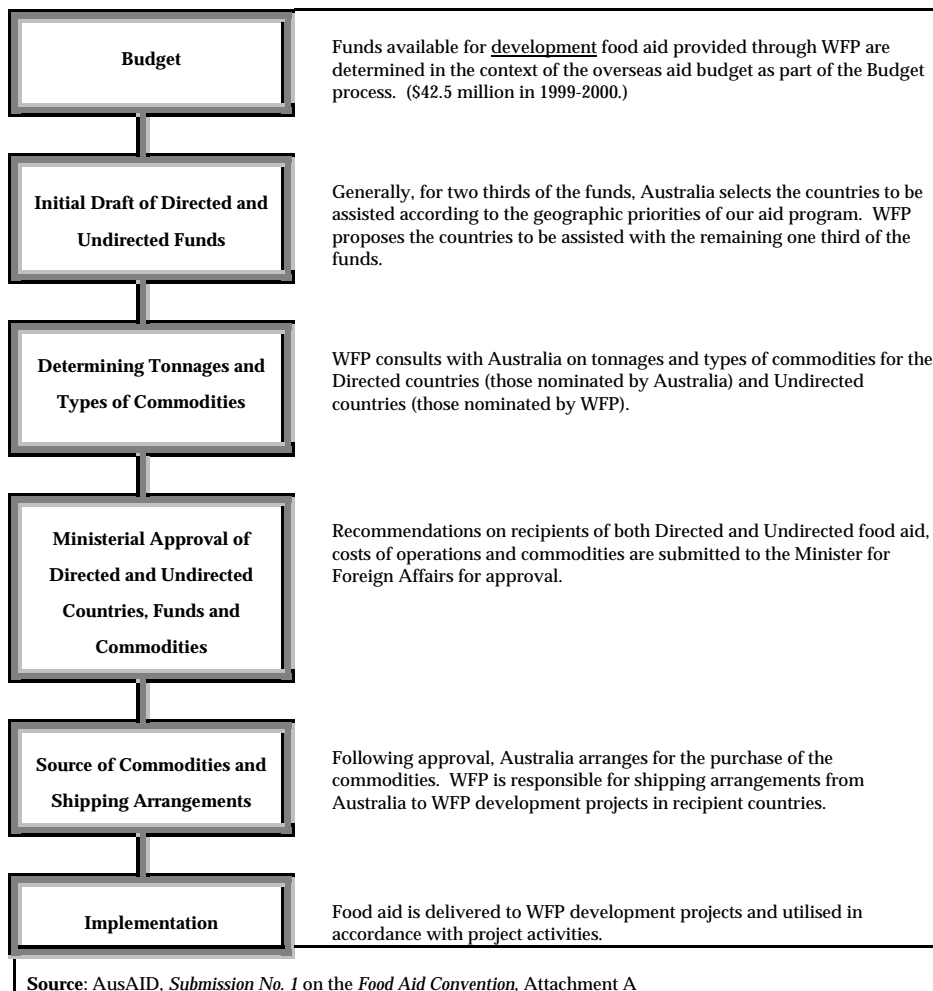
Agreement with the USA on Mutual Antitrust Enforcement Assistance

Exhibit No

1. Material dated 25 August 1999, provided by the Australian Competition & Consumer Commission



Appendix E – World Food Programme Development Projects





Appendix F – Consultation process for double tax agreements

The submission from the Australian Taxation Office (ATO) provided detailed background information on the Treaties Advisory Panel (TAP) which was set up to advise on double taxation agreement matters. This Appendix sets out the TAP's membership which is composed of tax professional specialists, as well as industry representatives and is, the ATO suggests, representative of business interests involved in double taxation issues.

MEMBERSHIP OF THE TREATIES ADVISORY PANEL

Australian Industry Group
Australian Society of Certified Practising Accountants
Minerals Council of Australia
Taxation Institute of Australia
Australian Bankers' Association
Law Council of Australia
Institute of Chartered Accountants
Corporate Tax Association
International Fiscal Association
Treasury
Attorney General's Department

OBJECTIVE AND PURPOSES OF THE ADVISORY PANEL

Objective

While recognising that the determination of tax treaties policies and the negotiation program, as well as the power to conclude such treaties, rest with Government, the Advisory Panel's objective is to ensure that adequate consultation has taken place with interested parties for the purposes of negotiation of tax treaties and the consideration of proposed treaties by the Joint Standing Committee on Treaties of the Parliament.

Purposes

The purpose of the Advisory Panel Sub-Committee meetings are:

1. to act as a forum through which the ATO exchanges views with tax practitioners and business representatives on the negotiation and conclusion of new Australian double taxation agreements (DTAs) and to amendments in respect of existing DTAs;
2. to provide input to the consideration by the Government of the DTA negotiation program (especially in respect to the relative priorities afforded to countries already listed), and to provide comments on possible extensions or variations to that program;
3. to develop workable DTA approaches which factor in the impact on business, while having regard to international tax treaties practices and the need to ensure that Australia collects its fair share of income tax revenue;
4. to identify issues arising from the negotiation, administration and/or application of DTAs which may need to be addressed by Government.