February 27, 2003

The Honorable George W. Bush, Jr.
President of the United States
1600 Pennsylvania Avenue, NW
Washington D.C.

Dear Mr. President:

Pursuant to Section 2104 (e) of the Trade Act of 2002 and Section 135 (e) of the Trade Act of 1974, as amended, I am pleased to transmit the report of the Advisory Committee for Trade Policy and Negotiations (ACTPN) on the U.S. - Chile Free Trade Agreement, reflecting the main and dissenting opinions of the ACTPN on the proposed agreement.

The ACTPN, with the exception of the representative from the International Brotherhood of Teamsters, endorses the U.S. – Chile Free Trade Agreement (the FTA). We believe the agreement substantially meets the negotiating objectives laid out in the Trade Act of 2002, and believe it to be strongly in the best economic interest of the United States. We also believe the FTA is a comprehensive state-of-the-art agreement that not only will benefit the U.S. and Chilean economies and employment opportunities, but also will provide a strong base on which to construct additional bilateral or regional agreements. The FTA should be enacted into law as soon as possible, so American farms, factories, services providers, and consumers can begin to receive the benefits of this agreement at the earliest possible date.

All ACTPN members concur with this recommendation and with the report of the ACTPN except for the representative of the Teamsters Union, whose dissenting views are included at the end of the main report.

Sincerely,

Jerry Jasinowski
Chairman
Trade Agreements Review Task Force
Advisory Committee for Trade Policy Negotiations

# The U.S. – Chile Free Trade Agreement (FTA)

## The Report of the
## Advisory Committee
## for Trade Policy and Negotiations
## (ACTPN)

**February 27, 2003**

**The Advisory Committee**
**for Trade Policy and Negotiations (ACTPN)**

**Report to the President, the Congress,**
**and the United States Trade Representative on the**

# U.S.-Chile Free Trade Agreement

## I. Preface

Section 2104 (e) of the Trade Act of 2002 requires that advisory committees provide the President, the U.S. Trade Representative, and Congress with reports required under Section 135 (e)(I) of the Trade Act of 1974, as amended, not later than 30 days after the President notifies Congress of his intent to enter into an agreement. Under Section 135 (e) of the Trade Act of 1974, as amended, the report of the Advisory Committee for Trade Policy and Negotiations must include an advisory opinion as to whether, and to what extent, the agreement promotes the economic interests of the United States and achieves the applicable overall and principal negotiating objectives set forth in the Trade Act of 2002

Pursuant to these requirements, the Advisory Committee for Trade Policy and Negotiations hereby submits its report.

## II. Executive Summary of Committee Report

The ACTPN, with the exception of the Teamsters Union, believes the U.S.-Chile Free Trade Agreement (FTA) fully meets the negotiating principles and objectives laid out in the Trade Act of 2002, and believes the FTA is strongly in the interest of the United States. It will level the playing field for America's farmers, factories, and service establishments. It will provide increased market access for American goods and services in Chile. It will provide lower-cost U.S. producer and consumer access to Chilean goods and services, and will do so in a manner that does not disrupt the U.S. economy. Adequate transition and adjustment times have been built into the agreement.

The agreement contains many new and innovative approaches that will advance the expansion of trade and economic relations between Chile and the United States. These include dispute settlement provisions that provide the option of utilizing monetary fines when enforcement is needed, therefore reducing the need to resort to trade restrictions that can cause significant trade dislocations when used as enforcement mechanisms. The agreement provides for new consultation mechanisms to expand possibilities for improving trade cooperation and heading off disputes. These include cooperation in addressing technical barriers to trade, environmental cooperation, and other areas.

The FTA is also notable for incorporating labor and environmental protections into the body of the agreement, ensuring that neither party fails to enforce its environmental and labor laws in a manner affecting trade between them.

Additionally, the FTA makes significant advances in protecting intellectual property, ensuring fair and effective protection for investors, improved business facilitation, greatly improved access for service providers, and state of the art treatment for new forms of doing business, including e-commerce.

The ACTPN, with the exception of one member, the representative of the Teamsters Union, fully believes this agreement to be strongly in the U.S. economic interest and to be a model and an incentive for additional agreements. We urge its quick adoption. The Teamsters' dissenting view is included at the end of the ACTPN's main report.

While the ACTPN and other advisory groups have had access to the text of the agreement, the text has not yet been made public. We concur with the need for both governments to complete their detailed legal reviews of the text, but we urge that this be completed quickly. We recommend that the text be provided to the public immediately upon completion of the legal review, so as to allow as much time as possible for the public to examine the text prior to its signing.

## III. Description of the Committee

The Advisory Committee for Trade Policy and Negotiations (ACTPN) is the U.S. government's senior trade advisory panel. It was established to provide the U.S. Trade Representative with policy advice on: (1) matters concerning objectives and bargaining positions of proposed trade agreements; (2) the implementation of trade agreements once they are in force; and (3) other matters arising in connection with the trade policy of the United States. The ACTPN provides an overview of trade policy and issues. Advice on matters affecting individual sectors or policy areas is expected to be provided by several Policy Advisory Committees in the areas of defense, agriculture, labor and environment, the Industry Sector Advisory Committees (ISACs), and Industry Functional Advisory Committees (IFACs).

In keeping with its broad charter, the membership of the ACTPN is representative of key economic sectors affected by trade. Members are drawn from business, industry, labor, agriculture, small business, service industries, retailers, and consumer interests. The membership of the ACTPN is appended to this report.

## IV. Advisory Committee Opinion on Agreement

The ACTPN (or "the committee"), with the exception of one dissenting member, fully endorses the U.S. – Chile Free Trade Agreement (the FTA or "the agreement") as negotiated by the President's U.S. Trade Representative. Our report draws on the views of all ACTPN members, representing a broad spectrum of trade-related industries and interests. We believe the agreement strongly promotes the economic interests of the United States and substantially achieves the overall and principal negotiating objectives set forth in the Trade Act of 2002. (The dissenting view is set forth at the end of this report.)

We believe the FTA will substantially improve market access in Chile for American farm products, industrial and other non-agricultural goods, and services. We also believe it will expand two-way trade opportunities and will benefit employment and living standards in both countries. We further believe the agreement will enhance the already strong Chilean commitment to economic openness and contribute to the economic and political stability of the entire region by providing a basis and incentive for further trade liberalization in the Western Hemisphere, significantly adding to the imperative of the Free Trade Agreement of the Americas negotiations.

Chile currently maintains a flat, across-the-board tariff of 6 percent that applies to all U.S.-made products. This has placed American farmers, factory workers, and service providers at a commercial disadvantage as Chile has negotiated an expanding number of free trade agreements with other countries. The United States has lost one-third of its market share in Chile over the last five years as Chile's purchases have been diverted away from U.S. suppliers. In contrast, the U.S. share of imports into other South American countries that have not been negotiating a broad network of free trade agreements has remained relatively stable.

The ACTPN is particularly concerned that the loss of U.S. market share may continue and even accelerate now that the Chilean free trade agreement with the European Union went into effect February 1, 2003. The European Union is Chile's largest supplier, and competes head-to-head with U.S. producers across the whole spectrum of imports into Chile. Every passing month risks more diversion of Chile's imports away from U.S. suppliers of farm and industrial goods and of services.

The Committee also believes that the economic interests of the United States are advanced on the import side of the agreement. Consumers will benefit from trade liberalization, and the staging of U.S. liberalization has taken account of the need of sensitive sectors to adjust to the reduction and eventual elimination of trade barriers to Chilean goods and services.

The agreement also helps fulfill a priority of Congress and the Bush Administration by aiding small and mid-sized enterprises (SME's) that wish to do business with Chile. SME's are disproportionately burdened by nontariff trade barriers that impose significant fixed or incremental costs, for these costs must be spread over fewer units of sales than is the case for large companies. The Chile agreement includes impressive achievements in reducing the kinds of nontariff barriers that particularly harm SME's. It largely eliminates physical presence and local investment requirements; it increases the simplicity and transparency of customs and government procurement procedures; it facilitates electronic commerce and entry into services trade; and establishes procedures for the elimination of technical barriers to trade.

The ACTPN's more detailed views on salient parts of the agreement follow, but the committee wants to stress that it endorses all parts of the agreement, including those not discussed in the following section. Our principal concern is timing – we urge the Administration and the Congress to get the agreement into effect as soon as possible. If it is possible to complete all requirements for implementation prior to January 1, 2004, we urge that the agreement go into effect on the earliest date rather than waiting for January 1st.

**Consumer and Industrial Products -- Market Access --** The ACTPN believes that the provisions on trade in goods achieve the Trade Act's market access goals. We particularly applaud the fact that 85 percent of bilateral trade in consumer and industrial goods will become totally duty free as soon as the agreement goes into effect. That, along with the eventual elimination of all tariffs and quotas on all goods is a significant accomplishment of negotiations. The ACTPN believes that the agreement's provisions for reinforcing the World Trade Organization (WTO) Technical Barriers to Trade (TBT) agreement and for promoting improvements in bilateral implementation of the TBT agreement fill an important need. The transparency and facilitation provisions are particularly welcome and can lead to a significant lessening of technical barriers and the cost of conformity assessment that falls heavily on smaller companies. The ACTPN hopes that both governments will make full use of the agreement's innovative committee on TBT issues and will build on this in future agreements. The committee urges that, to the extent possible, the text refer to "persons and other interested parties" rather than "persons" as those who are eligible to participate in the development of standards and regulatory procedures, as the former term would encompass organizations having an interest in the process and is in keeping with the U.S. tradition of transparency and openness.

**Agriculture --** The committee endorses the provisions covered in this agreement for agriculture. The agreement provides excellent bilateral improvements that encourage open and free trade between the two countries, but also enables strong coordination with Chile for significant gains at WTO multilateral negotiations and the Free Trade Area of the Americas (FTAA) regional negotiations. The phase out of the Chilean price bands in this agreement is groundbreaking and aggressive. The elimination of the bands will make US products less expensive and may increase consumption in Chile. The elimination of export subsidies is a priority for US agriculture at the WTO and, in this area, this aggressive and groundbreaking agreement provides the momentum for collaboration and success at the WTO and future FTAs.

The agreement specifically addresses sanitary and phytosanitary (SPS) issues and establishes a committee as a structure for resolving these issues before they become larger trade disputes. This committee, as well as those set up under the Trade in Goods and Technical Barriers to Trade chapters, hopefully allow the two parties to resolve disputes without having to resort to the formal dispute settlement process that carries the risk of sanctions that could disrupt trade for long periods of time. Although the agreement will result in a higher level of competition for some U.S. producers, the ACTPN believes that the FTA provides adequate adjustment times and will enhance trade and serve U.S. interests well. Along these lines, however, the ACTPN expresses its concern that health and safety standards be based on strict scientific evidence and not be available as a disguised means of protection that could limit imports of agricultural, fisheries, or other products. The ACTPN urges that this concern be kept at the forefront as additional trade agreements are negotiated.

**Services --** The ACTPN is pleased that the services commitments cover both the cross border supply of services and the right to invest and establish a local service presence, strengthened by a set of detailed disciplines on regulatory transparency. The ACTPN is especially pleased with the breadth of the sector accorded substantial market access under the agreement's "negative list" approach. It is the ACTPN's belief that the agreement will provide substantial opportunities for U.S. business in the services sector.

While endorsing the entire services part of the agreement, the committee wishes to note a few items of particular importance. Non-discrimination, most favored nation treatment, the ability for banks to establish branches and subsidiaries and also the ability for financia1 firms to offer services is important for the growth and competitiveness of all parts of U.S. trade. Other important services gains that broadly benefit trade are legislation to open cross-border supply of key insurance sectors while also providing expedited availability of insurance services and the major successes for the express delivery services industry, including expedited customs clearance for express shipments and a prohibition on cross subsidies from Chile Post.

**E-commerce --** The e-commerce and digital products provisions meet the ACTPN's objectives and provide state of the art recognition of the increased importance of this issue with regard to global trade and the principle of avoiding barriers that impede the use of e-commerce. The ACTPN finds the e-commerce provisions and the liberal treatment of services in this agreement especially important for ensuring future U.S. market access in these critical growth areas. The committee draws particular attention to the fact that the FTA establishes guarantees of non-discrimination and a binding prohibition on customs duties on products delivered electronically, and creates a favorable environment for the development of increased e-commerce.

**Investment --** The investment provisions of the Trade Act of 2002 were among the most hotly-debated, resulting in a specific set of negotiating instructions. The Committee believes the FTA fully meets the investment requirements laid out in the Trade Act of 2002. We believe, moreover, that the agreement improves the investment climate and protections for investors while simultaneously addressing the concerns that had been raised for possible abuse of investor-state provisions. The FTA provides for rights that are consistent with U.S. law and also contains fully transparent dispute settlement procedures that are open to the public and that allow interested parties to provide their input. The ACTPN fully endorses the investment provisions of the agreement, save for one dissenting view, which is included at the end of the main report of the committee.

**Intellectual Property Rights (IPR) --** The ACTPN applauds and endorses the state-of-the-art IPR provisions in the Chile agreement. The protection of patents, trademarks, geographic indicators, internet domain names and copyrighted works sets a new standard for free trade agreements that the committee hopes will be incorporated into additional agreements. The ACTPN also commends the strong IPR enforcement mechanisms and penalties' provisions, particularly the criminalization of end-user piracy and Chile’s guarantees of authority to seize and destroy not only counterfeit goods but also the equipment used to produce them. The committee wishes to stress the importance of full IPR protections including those for trademarks and stresses its full support for the excellence of the agreement in this respect.

**Customs Procedures and Rules of Origin** -- The ACTPN endorses the customs chapter of the agreement. The specificity of obligations with regard to customs procedures coupled with the commitments to information sharing to combat illegal trans-shipment of goods and facilitate express shipment go well beyond current customs agreements between the two countries. To be commended also is the incorporation of modern technology to ensure transparency and efficiency.

The text stresses that the parties will work together to use technology and automation as much as possible, and also that the release of goods should be accomplished quickly – and within 48 hours to the extent possible. Both these provisions are outstanding achievements. The ACTPN would recommend, however, that timelines be established for the completion of regulations by U.S. Customs to assist the trade in understanding the interpretation and requirements of U.S. Customs before the FTA is implemented.

With regard to rules of origin, the ACTPN finds them acceptable for this agreement, but wishes to point out that the proliferation of rules is raising the cost of doing international business and that restrictive rules could well impair future U.S. competitiveness as well as creating negative incentives for production and investment. The ACTPN urges that all future agreements give more attention to the need for flexibility in rules of origin, and that rules be worked out regionally rather than bilaterally to the extent possible.

**Government Procurement** -- The ACTPN is pleased with the provisions on government procurement and believes that they meet specified objectives. The breadth of coverage across central, regional and municipal governments, the strength of the transparency disciplines, and the criminalization of bribery in government procurement go well beyond other Western Hemisphere agreements and will serve as a model for ongoing negotiations in the area. The broad coverage of Chilean central government purchasing agencies does much to help level this particular playing field.

The committee endorses this part of the agreement fully and particularly wishes to highlight the fact that during the course of the FTA negotiation Chile became a signatory to the OECD anti-bribery convention and passed the necessary implementing legislation. The ACTPN urges the U.S. government to work closely with Chile in redoubled efforts to obtain a WTO agreement on transparency in government procurement.

**Labor Provisions --** No other aspect of the Trade Act of 2002 was debated more fully than that of labor issues. The ACTPN, with the exception of the Teamsters Union, believes the FTA fully meets the labor objectives that emerged from the Trade Act of 2002, and believes the text of the agreement provides an effective and balanced means of implementing the negotiating objectives for labor. The labor provisions are the most far-reaching that have ever been in a U.S. or Chilean trade agreement, and meet the Trade Act's requirements while still providing strong assurances that the provisions cannot be used as a means of disguised protectionism.[1] After lengthy debate the Congress decided that dispute settlement in labor matters should be limited to failure to enforce existing laws. The ACTPN believes the FTA faithfully implements that requirement.

[1] Some believe the U.S.-Jordan agreement was more far-reaching, but the Jordan agreement must be read in conjunction with the side-letter signed by both governments. That side-letter essentially requires that all trade disputes between the two countries be resolved by avoiding trade retaliation actions and employing monetary fines instead.

The committee particularly wishes to commend the agreement's emphasis on cooperation and mutual agreement in working together on labor issues. Under the agreement, both countries reaffirm their commitments under the International Labor Organization (ILO) Declaration on Fundamental Principles and Rights at Work. Both guarantee in an enforceable manner, as provided for in the Trade Act of 2002, that they will not fail to enforce their labor laws in a way that could affect trade. Both also agree to strive to ensure they do not weaken their labor laws in a manner that would affect trade. Members of the ACTPN want to see high labor standards and effective enforcement of laws, but also want to ensure that the new labor provisions called for by U.S. law cannot be used as protectionist devices to restrict trade. The committee believes that an excellent job was done by U.S. negotiators in achieving the objectives laid out by the Trade Act of 2002 in a manner that is likely to improve labor conditions and standards of living and avoid protectionism.

The committee also endorses the provisions for temporary entry of personnel providing for the entry of business visitors, intra-company transfer of personnel, and professionals. These provisions will improve the competitiveness of U.S. firms by facilitating the ability to send technicians and other personnel to Chile in a manner necessary to maintain equipment and services sold to Chile and to further build business. The ACTPN endorses these provisions but also notes the Teamsters' dissenting view that is included at the end of the main report.

**Environmental Provisions** – The ACTPN, with the exception of the Teamsters Union endorses the environmental provisions of the FTA and believes they provide effective and creative ways of contributing to environmental improvement. The agreement meets the requirements of the Trade Act of 2002 by requiring in an enforceable manner that neither country shall fail to enforce its environmental laws in a manner that could affect trade.

Both countries also endeavor to see that their domestic environmental laws provide high levels of environmental protection and that they will look for further improvements in their laws. In this context, it is particularly noteworthy that Annex A to the environmental provisions provides significant opportunities for building capacity to protect the environment, encouraging the steady improvement of environmental standards and protection, thus creating a favorable climate for investment and trade. Both also agree not to reduce the level of environmental protection as a means of gaining trade advantage. The ACTPN is particularly pleased with the amount of cooperation that is built into the agreement, most notably including cooperation to build a register in Chile similar to the U.S. toxic release inventory, a project to develop alternatives to methyl bromide, which both countries have agreed to phase out, and building wildlife protection collaboration.

**Dispute Settlement --** The ACTPN believes that effective dispute settlement provisions are essential to ensure that trade agreements are actually implemented and enforced. These provisions must provide for timely and effective resolution of disputes and application of enforcement mechanisms that are suitable to provide an adequate incentive for compliance when needed.

Suspension of tariff benefits under the agreement is available for all disputes, including disputes over enforcing labor and environmental laws, as a last resort -- but there is a clear preference that fines be used for all disputes where consultation fails to resolve matters.

The ACTPN views this as a particularly good feature in bilateral trade agreements, since no bilateral agreement can override the parties' World Trade Organization (WTO) commitments – e.g., the maximum U.S. trade retaliation could only be a snap-back to its WTO tariff levels. As the average U.S. WTO tariff world-wide is only 1.6 percent, fines are a potent – and non trade-distorting -- alternative.

The ACTPN wants to stress that trade retaliatory measures should be taken as a last resort, for they have the capability of interfering with trade and causing considerable economic disruption. The committee also believes that the best way to deal with trade disputes is through consultation and mutual understanding, and expresses its support for the excellent provisions in the FTA that seek such amicable resolution of disputes. The agreement also sets high standards of openness and transparency for panel procedures, including specific provisions on the relevant expertise of panel members. The dispute settlement provisions could be further improved, however, if the rules of procedure made clear that citizens can submit comments to the panels. The ACTPN, save for the dissenting view included at the end of this report, believes that the dispute resolution provisions fully meet the requirements of the Trade Act of 2002, and that they provide equivalent enforcement for all parts of the agreement – including the new labor and environmental provisions. The committee endorses the dispute settlement provisions and considers them to advance the state of the art in trade agreements.

February 27, 2003

**DISSENTING VIEWS OF**
**JAMES P. HOFFA, GENERAL PRESIDENT**

**INTERNATIONAL BROTHERHOOD OF TEAMSTERS**

The International Brotherhood of Teamsters, on behalf of its 1.4 million members, opposes the U.S.-Chile Free Trade Agreement (FTA) as negotiated by the President's U.S. Trade Representative. We believe that the agreement fails to promote the economic interests of the United States and fails to meet the congressional negotiating objectives laid out in the Trade Act of 2002. We believe the Chile FTA simply replicates the flawed trade policies of the past and falls far short of incorporating what we, and our allies abroad, have learned about the problems and weaknesses of the current system.

**Labor Rights** -- Under the agreement, Chile agrees to reaffirm its commitments under the International Labor Organization (ILO) Declaration on Fundamental Principles and Rights at Work and not to weaken its own laws in a manner affecting trade. This was also in the Jordan FTA. However, there are several factors unique to the U.S.-Chile relationship that differ from the U.S.-Jordan relationship, and the FTA with Chile does not reflect these differences, both in the labor and environment language, as well as in the rest of the agreement.

First, the language in the Chile FTA presumes that Chile's labor laws and practices essentially conform to the internationally recognized core workers' rights as outlined by the ILO and by U.S. trade laws. The U.S. has long recognized that Chile's labor laws are not up to international standards. For example, the U.S. State Department and the International Labor Organization have long held that Chile's labor laws do not allow all Chilean workers to fully exercise their fundamental rights, as defined by the 1998 ILO Declaration of Fundamental Principles and Rights at Work and the core ILO conventions it references. The Chilean trade union federation and some elected government officials also recognize this problem and have sought for years to reform the Labor Code, but these efforts have been repeatedly turned back by business and by some sectors of the government, including those left over from the dictatorship.

Unless Chile brings its labor law into compliance with ILO standards before the FTA goes into effect, the agreement's labor provisions will be a completely ineffective means of ensuring that core workers' rights are respected in Chile. The fact is that Chile can't reaffirm its commitment to ILO standards if it doesn't even enforce those standards now. Chile can commit to enforcing its own domestic laws – which the FTA requires – but that assumes Chile has appropriate labor and environmental laws on its books, which it doesn't. Furthermore, the provision stating that Chile won't weaken or eliminate its laws to attract trade is worthless when Chile can just assert that doing so was not to attract investment, but was part of their right to set domestic labor laws at whatever level they choose.

Finally, it is worth noting that the trade relationship between Chile and the U.S. is of a greater order of magnitude than that between the U.S. and Jordan, so the potential economic consequences of the agreement are much greater for both countries. This will have ramifications for the dispute settlement mechanism, which as described below falls far short of the congressional negotiating objectives laid out in the Trade Act of 2002.

**Enforcement --** The ACTPN assertion that the labor provisions in the Chile FTA "are the most far-reaching that have ever been in a U.S. trade agreement" is, in our view, false. Both the Chile FTA and the Singapore FTA are a major step backwards from the Jordan FTA.

First, under the Chile FTA, the procedures and remedies available for labor and environmental disputes are not "equivalent" to those that apply in commercial disputes, as required under the Trade Act of 2002. Article 6(7) of the Chile FTA states that the dispute settlement chapter of the agreement shall not apply to any provisions of the labor chapter except Article 2.1(a) on the effective enforcement of domestic laws. In other words, the FTA doesn't allow parties to enter into dispute settlement for anything other than Chile's failure to enforce its own laws. Therefore, the provision committing countries to strive to ensure that their domestic laws meet ILO standards and the provision committing countries to strive not to waive or derogate from their labor laws are both completely unenforceable. This falls short of the Jordan FTA, which does allow both the commitment to ILO standards and the non-derogation commitment to be subject to dispute resolution. In addition, this selective enforcement creates a perverse incentive for countries that are failing to enforce their existing labor laws to get rid of their laws rather than improve enforcement. A country with no labor laws, or with terrible labor laws that fall far short of ILO standards, faces no possible penalty under the Chile agreement, making the one enforceable labor provision of both agreements essentially meaningless.

Furthermore, under the Chile agreement, parties must first go through 60 days of consultations under Article 6 of the labor chapter before they can resort to dispute resolution. Parties can further delay resolution of a dispute over Article 2.1(a) by going through a second round of consultations under Article 4 of the dispute settlement chapter before finally proceeding to an arbitral panel.

Parties may feel they need to go through a second round of consultations under the dispute resolution chapter because the provisions in that consultation process are stronger than those in the labor chapter. The dispute resolution chapter of the Chile agreement gives consulting parties the right to request that the other Party make available personnel from government agencies and other regulatory bodies with expertise in the subject matter to provide information and answer questions. There is no such specific provision for this kind of request in the consultation provisions of the labor chapter.

Under Article 15(2) and (3), the suspension of benefits to sanction a violation should have "an effect equivalent to that of the disputed measure [i.e., the measure that violates the agreement];" parties request a level of suspension of benefits that meets this criteria, and if they cannot agree, a panel determines what the correct level of suspension is based on this same criteria.

Yet under Article 16, the panel determining an amount of a monetary assessment does not just determine what level of sanction would have an effect equivalent to that of the disputed measure. Instead, the panel also takes into consideration numerous mitigating factors including the reason a Party failed to enforce its labor law, the level of enforcement that could be reasonably expected, and any other relevant factors.

Under Article 15, a party can choose to pay a monetary assessment instead of enduring trade sanctions (the sanctions are supposed to equal the harm caused by the offending measure, as explained above), and the assessment will be capped at half the value of the sanctions. Under Article 16, the assessment is capped at $15 million, no matter what the level of harm caused by the offending measure.

Under Article 15, a party can suspend the full original amount of trade benefits (equal to the harm caused by the offending measure) if a monetary assessment (capped at half that value) is not paid. Under Article 16, the level of trade benefits a party can revoke if a monetary assessment is not paid is limited to the value of the assessment itself.

Under Article 15, it is presumed that the assessment will be paid out by the violating party to the complaining party, unless a panel otherwise decides, thus providing a punitive disincentive to potential violators. Under Article 16, the assessment is automatically paid into a fund to improve labor law administration in the violating country, thus compensating the violator.

On a separate issue, the Teamsters Union believes that the agreement should have included an independent citizen petition mechanism. Citizen petitions are important in order to implement the labor and environmental obligations of the agreements. Such a process is critical to ensuring that attention is brought to failures to enforce labor and environmental laws. Furthermore, it is imbalanced and inappropriate to omit such a mechanism when the U.S. proposal for investment includes a private right of action. This imbalance represents a failure to fulfill the Trade Act's mandate to seek equivalent dispute settlement mechanisms.

**Temporary Entry** -- USTR has negotiated temporary entry provisions in the Chile FTA without any authority or directions to do so from Congress. The negotiating objectives that Congress laid out for USTR in the 2002 Trade Promotion Authority bill (TPA) do not include even one word on temporary entry. The only negotiating objective on trade in services (the category under which temporary entry falls) is in section 2102(b)(2) of TPA, and it states in its entirety, "The principal negotiating objective of the United States regarding trade in services is to reduce or eliminate barriers to international trade in services, including regulatory and other barriers that deny national treatment and market access or unreasonably restrict the establishment or operations of service suppliers."

The term “service suppliers” more likely refers service companies, not service workers, since the “establishment or operations” of a corporation is common usage, while the terms “establishment” and “operations” are not commonly used to describe the temporary entry of individual workers. USTR has negotiated temporary entry provisions in the Chile FTA without any authority to do so. There is no specific authority in TPA to negotiate new visa categories or impose new disciplines on our temporary entry system, yet that is exactly what USTR has done in the Chile FTA.

Numerical caps on the number of professionals granted entry each year (1,400 for Chile) are separate from, and in addition to, the global H1B cap. At a time of high unemployment in the United States, it does not make sense to increase the number of professionals granted temporary entry beyond levels in current law.

The agreement allows a version of the Labor Certification Attestation (LCA), now required from employers under the H1B program, to be required for professionals from Chile. But the LCA allowed under the Chile agreement appears weaker than the LCA now required for H1B workers.

- The agreement allows an LCA that certifies employers are complying with domestic labor and immigration laws, but the current LCA goes beyond this to require employers to pay temporary workers the prevailing wage in the industry and to ensure that the conditions of employment do not undermine domestic labor conditions.
- The visa program set up under the agreement would require the temporary entrants – who have no knowledge of domestic labor conditions or their employer’s compliance with them – to submit the LCA rather than employers.
- The agreement would bar Congress from strengthening the LCA in the future to actually allow the Department of Labor to enforce an LCA with audit authority.
- The agreement contains no separate LCA requirements for employers who are dependent upon temporary workers, as there currently is under our H1B program.

The agreement’s definition of professionals is unacceptably broad. It includes any job that requires a Bachelors degree, even if we have no domestic labor shortage in the job category. This completely does away with the only justification for our current H1B program and all other temporary entry programs for professionals, which is to address domestic labor shortages. Even NAFTA included a list of professions in which entry would be allowed.

The agreement limits fees charged to visa applicants to the costs of processing, making it impossible to collect higher fees and use those for domestic training programs. This is something we already do under the H1B program, charging $1000 for temporary entry visas and using the money to finance training.

**Environment** -- The Teamsters Union is concerned that the definition of "environmental law" in Article 10 of the Environment chapter excludes laws or regulations whose primary purpose is managing the commercial harvest or exploitation of natural resources.

We recognize that this exclusion is subject to the provision in Article 10(c) indicating that the primary purpose of any particular provision shall be determined separately from the purpose of the law of which it is part. Nonetheless, we are concerned that there may be particular provisions of law and regulations that may be viewed by some as regulating natural resource extraction, although such a provision serves an important environmental purpose. We are concerned that the current definition of environmental law may not be sufficiently clear to ensure that the Environment chapter covers the full range of regulatory provisions that have environmental purposes.

**Investment** -- The Teamsters Union believes that the Chile FTA does not accomplish the congressional mandate that trade agreements not grant foreign investors greater substantive rights than U.S. investors are afforded under U.S. law. The agreement fails to include the critical Supreme Court principle that a governmental action must *permanently* interfere with a property *in its entirety* in order to meet a threshold requirement to constitute a taking. Penn Central Transportation Co. v. New York City, 438 U.S. 104, 130-31 (1978). Recently, the Supreme Court rejected a taking claim arising out of a *temporary* moratorium on development. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 122 S. Ct. 1465 (April 23, 2002).

Significantly, the Chile FTA provides no explanations and limitations for the critical standards, including the proposed use of the "character of government action" as a factor in expropriation analysis. This is important because the Supreme Court's reference to that factor in Penn Central reflects a clear limitation on takings claims under U.S. law. In Penn Central, the Court distinguished between physical takings and regulatory takings. The Court specifically limited a finding of takings in regulatory settings, while distinguishing these from physical invasions of property. Yet, the Chile FTA fails to reflect this limitation and distinction, and the phrase is thus left open to *any* interpretation by future investment tribunals.

In addition, the language concerning the analysis of an investor's expectations is too vague, and does not indicate the deference to governmental regulatory authority that is found in U.S. jurisprudence. The agreement does not include critical limitations stating that an investor's expectations are a necessary, *but not sufficient*, condition for liability, that an investor's expectations must be evaluated as of the time of the investment or that an investor must expect that health, safety, and environmental regulations often change and become more strict over time. In Concrete Pipe, the Court reiterated the principle that those who do business in an already regulated field "cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." 508 U.S. at 645.

The agreement's definition of property rights is vague and does not recognize the Supreme Court's holdings that takings claims must be based upon compensable property interests, which are defined by background principles of property and nuisance law. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992).

The agreement also fails to include the Supreme Court's fundamental distinction between land and "personal property." "In the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [the owner] ought to be aware of the possibility that new regulations might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale)." Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1028 (1992).

The Chile FTA should have included the standard established in Supreme Court jurisprudence that an adverse effect on economic value does not by itself constitute an expropriation. In fact, the Penn Central opinion refers to cases in which 75% and 87.5% diminution in value did not constitute a taking. As well, in Concrete Pipe a unanimous Supreme Court stated: " [O]ur cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking. Euclid v. Ambler Realty Co., 272 U.S. 365, 384 (1926); Hadacheck v. Sebastian, 239 U.S. 394 (1915). Concrete Pipe & Products v. Construction Laborers Pension Trust, 508 U.S. 602, 645 (1993).

In light of this it is clear that the agreement's language clarifying that the exercise of regulatory powers by governments only constitutes an expropriation in "rare circumstances" is unacceptable; it utterly fails to convey that it would take an extreme circumstance for a regulation to be found a "taking." See United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985) where the Court stated that land-use regulations may be takings in "extreme circumstances."

In regard to minimum, or general, treatment, the term "fair and equitable treatment" has been included as an essential element of the standard. "Fair and equitable treatment" opens the door to outcomes in investment cases that go far beyond U.S. law. There is no right corresponding to "fair and equitable treatment" under U.S. law. The closest thing in U.S. law is the Administrative Procedure Act (APA), which allows a court to review federal regulations to determine whether they are "arbitrary or capricious." But the APA does not apply to many governmental actions that are covered under investment agreements. Moreover, the APA does not provide for monetary damages (as these investment provisions would allow); only injunctive relief is allowed.

Foreign investors have the same rights as U.S. investors under the APA to seek injunctive relief. Enshrining this equal access in a trade agreement is one thing, but granting foreign investors the right to be paid the costs of complying with a requirement that may violate the APA but does not constitute a compensable taking under the Constitution as interpreted by the Supreme Court clearly violates Congress' "no greater substantive rights" mandate.

**APPENDIX:**

**MEMBERSHIP OF THE**

**ADVISORY COMMITTEE FOR TRADE POLICY AND NEGOTIATIONS**

February, 2003

Bernard W. Aronson, Managing Partner, ACON Investments, LLC
Paul Norman Beckner, President and CEO, Citizens For A Sound Economy
JoAnn Brouillette, President, Demeter
Melinda S. Johnson Bush, President and CEO, HRW Holdings, LLC
Jill M. Considine, Chair and CEO, The Depository Trust and Clearing Corporation
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George B. Fitch, President, IOP Associates, Mayor of Warrenton, VA
William E. Frenzel, Guest Scholar, Brookings Institute
Michael Goldstein, Chairman, Toys "R" Us Children's Fund
Robert Edward Grady, Managing Director, The Carlyle Group
F. Henry (Hank) Habicht II, CEO, Global Environment and Technology Foundation
Peter M. Hanna, Chairman, President and CEO, Hanna Steel Corporation
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James Philip Hoffa, General President, International Brotherhood of Teamsters
Jerome J. Jasinowski, President, National Association of Manufacturers
Fisk Herbert Johnson, Chairman, SC Johnson & Son, Inc.
Hersh Kozlov, Senior Partner, Wolf, Block, Schorr and Solis-Cohen LLP
Luis J. Lauredo, President, Hunton & Williams, Latin American Services, LLC
Larry A. Liebenow, President and CEO, Quaker Fabric Corporation
James Winston Morrison, President, Small Business Exporters Association
Thomas D. Mottola, Chairman and CEO, Sony Music Entertainment
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Samuel J. Palmisano, President and CEO, IBM Corporation
Edward J. Perkins, Crowe Professor in Geo-Politics and Executive Director of International Programs, University of Oklahoma
Richard E. Rivera, Chief Operating Officer, Darden Restaurants
Steven Rollie Rogel, Chairman, President and CEO, Weyerhaeuser Company
Jean-Pierre C. Rosso, Chairman, CNH Global
John G. Rowland, Governor of Connecticut
Hector Ruiz, President and CEO, Advanced Micro Devices
Rodolphe M. Vallee, Chairman, CEO and Owner, R.L. Vallee, Inc.
Morgan Yaping Wang, CEO and Chairman, Angeles Optics, Inc.
Richard M. Wardrop, Jr., Chairman, CEO and President, AK Steel Corporation
Margaret Cushing Whitman, President and CEO, eBay Inc.
Wythe W. Willey, President, National Cattlemen's Beef Association